Supreme Court, U.S.
FILED
OCT 28 2004
OFFICE OF THE CLERK

No. 04-581

In The

Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,

Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. JONKER*
DANIEL P. ETTINGER
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000
Counsel for Petitioner

October 28, 2004

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Congress delegated to the States under the Indian Gaming Regulatory Act power to establish the regulatory rules applicable to Indian casino gambling within a State's borders?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The only parties to this proceeding are Petitioner and Respondents. Pursuant to Supreme Court Rule 29.6, Petitioner Taxpayers of Michigan Against Casinos states that it has no parent corporation or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	3
I. Overview	3
II. The Trial Court Holds the Compacts Invalid	5
III. The Michigan Supreme Court Concludes that IGRA Delegates No Regulatory Power to the States	6
REASONS FOR GRANTING THE PETITION	10
I. This Court Should Grant the Petition to Resolve a Split of Authority Between the Michigan Supreme Court and a Number of Other State and Federal Courts on an Important Issue of Federal Law	10
II. The Issues Presented by this Case Are of National Importance	15
A. State-Tribe compacts are of national interest as a matter of U.S. Constitutional law	15

TABLE OF CONTENTS – Continued

Page

B. Indian gaming itself presents issues of national importance 17

III. The Decision Below Incorrectly Interprets IGRA 19

CONCLUSION 26

TABLE OF AUTHORITIES

Page

FEDERAL CASES

American Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012 12

Arizona v. Maypenny, 451 U.S. 232 (1981) 17

Artichoke Joe's California Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) 8, 13, 14, 21

Baird v. Babbitt, No 5:99-CV-14 (W.D. Mich. 1999) 5

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) 20, 23

Cuyler v. Adams, 449 U.S. 433 (1981) 11, 16

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) 11

Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996) 14

INS v. Chada, 462 U.S. 919 (1983) 6, 13

Illinois v. Wardlow, 528 U.S. 119 (2000) 11

Keweenaw Bay Indian Community v. United States, 136 F.3d 469 (6th Cir. 1998) 20

Kosydar v. Nat'l Cash Register Co., 417 U.S. 62 (1974) 17

New York v. Hill, 528 U.S. 110 (2000) 16

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997), *cert. denied*, 522 U.S. 807 20

Rodriguez v. U.S., 480 U.S. 522 (1987) 6

United States v. Cook, 922 F.2d 1026 (2d Cir. 1991) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Santa Ynez Band of Chumash Mission Indians, 983 F. Supp. 1317 (C.D. Cal. 1997) 21

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 15, 16

Williams v. Lee, 358 U.S. 217 (1959) 17

Yakus v. United States, 321 U.S. 414 (1944) 7

STATE CASES

Confederated Tribes of Chehalis Reservation v. Johnson, 958 P.2d 260 (Wash. 1998) 12

Hotel Employees & Restaurant Employees Int'l Union v. Davis, 981 P.2d 990 (Cal. 1999) 21

Narragansett Indian Tribe of Rhode Island v. Rhode Island, 667 A.2d 280 (R.I. 1995) 12

Panzer v. Doyle, 680 N.W.2d 666 (Wis. 2004) 12

Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047 (N.Y. 2003) 11, 12, 22

State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995) 12

State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) 12, 22

STATUTES

18 U.S.C. § 1166 ..... *passim*

25 U.S.C. § 2701(3) 21

25 U.S.C. § 2710 ..... 2, 22, 23

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1257(a) 1

Mich. Comp. Laws §§ 750.301-750.303, 750.309 4

CONSTITUTIONS

Mich. Const. 1963, art. 4, § 26 5

U.S. Const. art. I, § 10, cl. 3 15

MISCELLANEOUS

134 Cong. Rec. 24,029 21

FBI, Indian County Crime, *available at* http://www.fbi.gov/hq/cid/indian/indgaming.htm 18

Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004 ..... 17, 18

Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule*, The American Enterprise, Sept. 2004 ..... 18, 19

John R. Emshwiller & Christina Binkley, *Roll of the Dice: As Indian Casinos Grow, Regulation Raises Concerns*, Wall St. J. Aug. 23, 2004, at A1 17

Mich. Senate R. 3.107 5

National Indian Gaming Commission, Growth in Indian Gaming, *available at* http://www.nigc.gov/nigc/tribes/revenue-03-05.jsp 18

Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999) 17, 18

TABLE OF AUTHORITIES – Continued

Page

S. Ct. R. 10(b) 11

S. Rep. No. 100-446, at 13-14 20

S. Rep. No. 446, 100th Cong., 2d Sess. 12, 13 (1988) 20

Select Committee on Indian Affairs Report, S. Rep. No. 100-446, at 1-6 22

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Taxpayers of Michigan Against Casinos ("TOMAC"), respectfully petitions this Court to review the judgment of the Michigan Supreme Court.

OPINIONS BELOW

The opinion of the Michigan Supreme Court (App., 1-110) is reported at 471 Mich. 306, 685 N.W.2d 221 (2004). The opinion of the Michigan Court of Appeals (App., 111-37) is reported at 254 Mich. App. 23, 657 N.W.2d 503 (2002). The opinion of the trial court (App., 138-56) is unreported.

JURISDICTION

The Michigan Supreme Court's judgment was entered on July 30, 2004. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Indian Gaming Regulatory Act, 18 U.S.C. § 1166(a), provides in relevant part:

> Subject to [class III gaming conducted under a State-Tribal compact], for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the

> same manner and to the same extent as such laws apply elsewhere in the State.

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(5), provides in relevant part:

> Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

INTRODUCTION

This is one of several cases recently decided by state supreme courts and the United States Court of Appeals for the Ninth Circuit that address the nature of the federal power delegated to and exercised by the States under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA). Contrary to the Ninth Circuit and several state supreme courts, the Michigan Supreme Court concluded that Congress delegated no regulatory power to the States over tribal gaming when it enacted IGRA. This was a crucial – and erroneous – determination of federal law that drove a majority of the Michigan Supreme Court to validate four State-Tribe gambling compacts despite the absence of support from the legislative majority necessary to approve a legislative enactment in Michigan. As dissenting Justice Markman recognized, this erroneous construction of federal law transformed "a realm in which the federal government has unequivocally authorized Michigan to exercise regulatory authority . . . into the

exclusive province of a single public official, the Governor. . . ." (App., 109.)

The federal issues raised in this dispute present recurring questions of national significance, as tribal casinos – and the lawsuits they invariably spawn – continue to proliferate. The importance of the question presented, the uncertainty caused by the split of authority, and the significance of this Court's oversight of the compacting process all counsel in favor of this Court's grant of the petition.

STATEMENT OF THE CASE

I. Overview.

In December 1998, Michigan's Governor negotiated and signed gaming compacts with four Indian Tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Notawaseppi Huron Potawatomi. The compacts authorized four new Indian casinos in the State of Michigan that would have been illegal under State and federal law in the absence of a valid compact. The compacts also created the regulatory framework for the authorized casinos, and specified payments due to the state and local governments in exchange for the casino franchise.

As contemplated by IGRA, the compacts impact State public policy, create new rules and obligations that bind those outside the legislature, and replace the existing state laws and regulations with the terms of the compacts themselves. Among other things, the compacts:

- create an entire regulatory scheme for Indian gaming in Michigan substantially different than the regulatory scheme defined by Michigan law and made applicable to the Tribes under IGRA, 18 U.S.C. § 1166;
- determine the jurisdictional balance between the State of Michigan and the Tribes;
- determine how many casinos each Tribe will be allowed to have in Michigan;
- set the minimum age for gambling in the four Indian casinos at eighteen, despite existing Michigan law that generally prohibits casino gambling by anyone younger than twenty-one;
- decide how much revenue to raise for the State and where that revenue will go;
- bar casinos within 150 miles of Detroit so as to protect existing Detroit casinos from competition, while leaving other entertainment or business venues unprotected; and
- mandate new local units of government, known as "Local Revenue Sharing Boards," to receive and distribute payments due from the Tribes under the compacts.

Absent the compacts, the permitted gambling would be a crime under Michigan law. Mich. Comp. Laws §§ 750.301-750.303, 750.309. *See* 18 U.S.C. § 1166; *see also United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir. 1991) (affirming conviction for operation of slot machines on Indian lands in violation of New York law).

The four compacts were originally enrolled as House Bill 5872 (1998) and offered for approval as a legislative

enactment. *See Baird v. Babbitt*, No 5:99-CV-14, slip op. at 2 (W.D. Mich. 1999). But legislative approval for this bill never materialized. *Id.* Accordingly, the Michigan Legislature proceeded to "approve" the compacts by resolution, HCR 115 (1998). Unlike a legislative bill, which requires a majority of elected and serving members for passage, a resolution may be passed by a majority of the legislators present at the time a vote is taken, Mich. Const. 1963, art. 4, § 26; Mich. Senate R. 3.107, and is ordinarily reserved for more mundane matters, such as commemorating the 150th anniversary of the selection of Lansing as Michigan's capital, or urging the President to designate the Detroit River as an American Heritage River. (App., 55.)

Casino supporters were forced to proceed by resolution, because the compacts lacked the necessary support to gain approval by a majority of Michigan's elected and serving legislators. In fact, when HCR 115 was first considered during the 1998 lame duck legislative session of the Michigan House of Representatives, it was defeated 52 to 39. Over the next three days, the resolution was defeated twice more before the House finally approved it 48 to 47, a full seven votes short of the 55 that were required to pass legislation. *See* 1998 Journal of the House (listing 108 members).

II. The Trial Court Holds the Compacts Invalid.

Petitioners filed suit, seeking a declaratory ruling that the compacts were unconstitutional because they failed to garner the support of a majority of Michigan's legislators. In its Opinion dated January 18, 2000, the Ingham County Circuit Court agreed. (Cir. County Ct. Op., App., 138-56.) Relying on state supreme court decisions in Kansas and

New Mexico, as well as this Court's decisions in *INS v. Chada*, 462 U.S. 919, 952 (1983), and *Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987), the court concluded that HCR 115 was legislation that could only be approved by bill, not resolution. (App., 144-47.) In particular, the court relied on the compacts' regulatory decisions to (1) authorize casino style gambling by persons under the age of 21, activity that Michigan law otherwise prohibits, and (2) mandate the creation of local revenue sharing boards. (App., 148, 150.) In so holding, the court specifically rejected the defendants' argument that "the State has no authority to regulate any casino gambling on Indian land," recognizing that public policy is implicated by the compacts' lowering of the legal gambling age and their provision for an extensive regulatory scheme over the casinos. (App., 149-50.)

III. The Michigan Supreme Court Concludes that IGRA Delegates No Regulatory Power to the States.

On November 12, 2002, the Michigan Court of Appeals reversed the trial court decision, concluding that the power of the states to regulate in the area of Indian gaming is preempted by federal law (App., 134), notwithstanding IGRA's plain language to the contrary. *See* 18 U.S.C. § 1166. The Michigan Supreme Court accepted leave to appeal and affirmed in a fractured and divided opinion.

The Michigan Supreme Court began with a review of IGRA, concluding that "State legislatures have no regulatory role under IGRA aside from that negotiated between the tribes and the states." (App., 12; *see also id.* at 13 ("The only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact.").)

The court then examined 18 U.S.C. § 1166(a), which specifically states that "for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in the same manner and to the same extent as such laws apply elsewhere in the State." The court did not read this plain language as giving the States regulatory power, but rather read the provision as an incorporation of "state laws as the federal law governing nonconforming tribal gaming." (App., 14.) This logic led to the court's astonishing conclusion that "when the Legislature approves a tribal-state compact, it approves a change in *federal* law rather than its own." (*Id.*) In sum, the court said, although section 1166 "effectively 'borrows' Michigan law for purposes of federal law, it does not delegate any regulatory power to the states." (App., 15.)

Having concluded that the State-Tribe compacting process involves no State regulation, but rather a State's amendment of federal law, the Michigan Supreme Court then held that such an amendment could be accomplished permissibly by resolution, rather than legislation. (App., 19-23.) Recognizing this Court's pronouncement that "[t]he essentials of the legislative function are the determination of legislative policy and its formulation and promulgation as a defined and binding rule of conduct," (App., 24, quoting *Yakus v. United States*, 321 U.S. 414, 424 (1944)), the Michigan Supreme Court concluded that the Michigan Legislature had done nothing more than assent to a contract between two sovereign entities, because the Legislature "lacks the authority to bind the tribes at all." (App., 24-25.) In the court's words: "Through IGRA, Congress has determined that states may not unilaterally impose their will on the tribes regarding gaming; rather,

the states may only negotiate with the tribes through the compacting process." (App., 25.)

Justices Stephen J. Markman and Elizabeth A. Weaver dissented. Justice Weaver explained that the "approval of a compact with an Indian tribe involves numerous policy decisions." (App., 54.) She then noted the split in authority, stating that she "would agree with the other state courts that have examined this issue, and hold that committing the state to the myriad policy choices inherent in negotiating a gaming compact constitutes a legislative function," thus requiring approval by legislative act. (*Id.*)

Justice Markman recognized that in enacting IGRA, "Congress provided the consent to the states that was found lacking in [this Court's decision in] *Cabazon* to regulate tribal gambling in the same manner and to the same extent that states regulate gambling elsewhere within their borders." (App., 64.) Justice Markman then noted the split of authority between the majority's reasoning and a recent Ninth Circuit decision, *Artichoke Joe's California Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003):

> My colleagues in the majority . . . simply ignore the relevance of § 1166 in determining the lawfulness, in the absence of a compact, of casino gambling on Indian land. They do this by summarily noting and relying on the fact that it is the federal government that is charged under § 1166 with enforcing the applicable state law regulations. As already indicated, I agree with the United States Court of Appeals for the Ninth Circuit in *Aritchoke Joe's*, that, "the fact that the federal government retained the enforcement power does not change the fact that states may enact laws and regulations concerning gambling

> that have an effect in the absence of a compact on Indian lands." That is, the states retain *substantive* authority over gambling law on Indian lands. . . . *The relevant legislative history indicates that Congress chose to make state gambling laws applicable to tribes* not for reasons of "expediency," but *to specifically give states some regulatory power over casino gambling on Indian land.*

(App., 77-78 n.41 (emphasis added).)

Finally, Justice Markman took issue with the majority's conclusion that the States lack the authority to bind tribes:

> Although § 2710(d) provides for a negotiation process, the tribes are *not* wholly free to withhold their "consent" from the legislature to enter into contracts regulating casino gambling on their lands and to, instead, engage in such gambling without compacts. This is because in the absence of a compact, casino gambling is *unlawful.* § 2710(d)(1).

(App., 94.) Thus, Justice Markman concluded:

> The result of the majority's analyses in this case is that a matter of fundamental policy concern to the people of this state – casino gambling and its social and economic impact – a realm in which the federal government has unequivocally authorized Michigan to exercise regulatory authority, has now been transformed into the exclusive province of a single public official, the Governor. . . . *The [majority's] decision represents the first state supreme court in the United States to conclude that a tribal-state gambling compact does not constitute "legislation"* and, therefore,

> does not require the approval of the branch of government that is most directly representative of the people.

(App., 109-110 (emphasis added).)

REASONS FOR GRANTING THE PETITION

This case presents questions of national legal and societal importance that this Court has not previously addressed. The Michigan Supreme Court has held that Congress did not intend to delegate regulatory power over Indian gaming when it enacted IGRA and that, as a result, there is no need for a State legislative act to approve a State-Tribe compact. But the Michigan Supreme Court's holding is inconsistent with the text and intent of IGRA; further widens a split in authority between the Michigan Supreme Court and the supreme courts of other states, as well as the Ninth Circuit; and leaves the meaning of IGRA, a key statute governing State and Indian affairs, in a state of impenetrable confusion. This Court should grant the petition to clarify the balance of power that IGRA created between the tri-partite sovereigns of the United States, the several States, and Indian Tribes, to resolve the split in authority, and to eliminate the resulting confusion.

I. This Court Should Grant the Petition to Resolve a Split of Authority Between the Michigan Supreme Court and a Number of Other State and Federal Courts on an Important Issue of Federal Law.

A core ground for granting a petition for a writ of certiorari is a conflict between state supreme courts

regarding matters of federal law. S. Ct. R. 10(b); *Illinois v. Wardlow*, 528 U.S. 119, 123 n.1 (2000) (certiorari granted to resolve conflict among state courts over "whether unprovoked flight is sufficient grounds to constitute reasonable suspicion" under the Fourth Amendment); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 753 & n.1, 105 S. Ct. 2939, 2942 & n.1 (1985) (certiorari granted to resolve conflict among state courts over whether certain First Amendment protections previously determined by the U.S. Supreme Court apply to non-media defendants). Certiorari is also appropriate to resolve conflicts between state and federal appellate courts as to matters of federal law, including the interpretation of congressionally approved interstate compacts. *Cuyler v. Adams*, 449 U.S. 433, 435-36 (1981). Here, the Michigan Supreme Court's decision furthers a conflict among state supreme courts and creates a conflict with the Ninth Circuit Court of Appeals regarding the balance of State and Tribal power under IGRA, and therefore warrants this Court's immediate resolution.

In *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003), for example, the New York Court of Appeals held unequivocally that IGRA State-Tribe compacts represent State regulation and, therefore, legislation:

> gaming compacts are laden with policy choices, as Congress well recognized. . . . *Compacts* addressing [issues such as the application of the criminal and civil laws, the allocation of criminal and civil jurisdiction, and taxation] *necessarily make fundamental policy choices that epitomize "legislative power."* Decisions involving licensing, taxation and criminal and civil jurisdiction

> require a balancing of differing interests, a task the multi-member representative Legislature is entrusted to perform under our constitutional structure.

Id. at 1060 (emphasis added).

Other state courts have reached the same conclusion in a variety of contexts, including the supreme courts of Kansas, New Mexico, Rhode Island, and Wisconsin. *Panzer v. Doyle*, 680 N.W.2d 666, 687 (Wis. 2004) (agreeing with courts in other jurisdictions that have "concluded that entering into a tribal-state compact under IGRA, thereby committing the state to a particular position with respect to Indian gaming, involves subtle and important decisions regarding state policy that are at the heart of legislative power."); *State ex rel. Clark v. Johnson*, 904 P.2d 11, 23 (N.M. 1995) ("We also find the Governor's action to be disruptive of legislative authority because the compact strikes a detailed and specific balance between the respective roles of the States and the Tribe in [a number of respects]."); *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280, 281-82 (R.I. 1995) (only Rhode Island Assembly had legislative power required to execute a gaming compact); *State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1185 (Kan. 1992) ("[M]any of the provisions in the compact would operate as enactment of new laws and the amendment of existing laws."); *accord American Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012, 1072 (Governor engages in a "kind of legislative act by establishing state gaming policy"). *But see Confederated Tribes of Chehalis Reservation v. Johnson*, 958 P.2d 260, 267 (Wash. 1998) ("Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.").

Indeed, as Michigan Supreme Court Justice Markman noted in dissent, "*every state supreme court that has directly considered this issue has held that tribal-state gaming contracts constitute legislation.*" (App., 86 n.48 (emphasis added).) And the fact that so many published decisions address this issue demonstrates the recurring problem of how to define the regulatory balance struck between the federal government, state governments, and tribal governments since Congressional enactment of IGRA.

In contrast to the above authorities, the Michigan Supreme Court has now concluded that State-Tribe gaming compacts may be authorized without a legislative enactment. This conclusion followed directly from the court's mistaken interpretation of federal law, specifically its determination that Congress delegated no regulatory authority to States over tribal gaming when Congress enacted IGRA.[1] But as the Ninth Circuit explained in

[1] The Michigan Supreme Court purported to apply the four factor test this Court articulated in *INS v. Chada*, 462 U.S. 919, 952 (1983), for determining whether a legislative act constitutes "legislation," (App., 22-26), but its erroneous conclusion that IGRA delegates no regulatory authority to the States pre-ordained the outcome of the analysis. For example, based on its misunderstanding of federal law, the Michigan Supreme Court stated that "the compacts do not give the state the power to alter the rights, duties, or relations of anyone subject to the Legislature's authority." (App., 23.) The Court's statement is demonstrably incorrect. Under 18 U.S.C. § 1166, Michigan's general prohibition against casino gaming applies unless and until a compact or other exercise of legislative law-making provides otherwise. Accordingly, approval of a compact plainly alters the legal relations of parties outside the Michigan legislature. Likewise, the Michigan Supreme Court's claim that "[t]hrough IGRA, Congress has determined that states may not unilaterally impose their will on the tribes regarding gaming," is palpably wrong in light of the plain language of § 1166, as described by *Artichoke Joe's*.

Artichoke Joe's, the Michigan Supreme Court's assumption is simply wrong:

> IGRA responded [to *Cabazon*] by creating a statutory basis for gaming regulation that introduced the compacting process as a means of *sharing with the states the federal government's regulatory authority over class III gaming*. Simultaneously, IGRA put into effect 18 U.S.C. § 1166, which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." The federal government retained the power to prosecute violations of state gambling laws in Indian country, so as to preserve the delicate balance of power between the States and the tribes. However, *the fact that the federal government retained that power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via § 1166.*

353 F.3d at 722 (emphasis added). *But see Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the *only* method by which a state can apply its general civil laws to gaming is through a tribal-state compact.") (emphasis added).

The Michigan Supreme Court's interpretation of IGRA and IGRA compacts thus adds to a growing split of authority, with published decisions of the Ninth Circuit and five sister supreme courts on one side, and the

Michigan Supreme Court, the Washington Supreme Court, and the Eighth Circuit on the other. The Michigan Supreme Court's interpretation also directly thwarts the will of Congress, which intended to delegate substantial regulatory authority over tribal gaming to the States. Without resolution of the conflict by this Court, lower courts will continue to disagree over the scope of State power and the validity of State-Tribe compacts, and the law will remain unsettled. This Court's immediate intervention is required to settle this important area of the law, and to vindicate 18 U.S.C. § 1166, which has been rendered a nullity by the Michigan Supreme Court's decision.

II. The Issues Presented by this Case Are of National Importance.

A. State-Tribe compacts are of national interest as a matter of U.S. Constitutional law.

This dispute arises out of four State-Tribe compacts that Congress authorized through IGRA under the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, the same provision that allows Congress to sanction interstate compacts. As this Court has reiterated numerous times, such compacts, between sovereign governments, are federal laws subject to federal judicial review, and thus require only limited deference to state court decisions reviewing the compacts, even if such review involves interpretation of state constitutional law.

In *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), this Court addressed the validity of an interstate pollution compact, reversing a decision of the West Virginia Supreme Court that the compact was in conflict with the West Virginia Constitution. This Court began by

noting that *a "compact* is more than a supple device for dealing with interests confined within a region[,] it *is* also *a means of safeguarding the national interest. . . ." Id.* at 27 (emphasis added). "Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts." *Id.* at 28. Moreover, while this Court traditionally defers to "what the highest court of a State deems to be the law and policy of its State," this Court is "free to examine determinations of law by State courts in the limited field where a compact brings in issue the rights of other States and the United States," even where "local legislation and questions of state authorization may be involved." *Id.* at 28-29 (citations omitted). *Accord New York v. Hill*, 528 U.S. 110, 111 (2000) ("'a congressionally sanctioned interstate compact' within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the [Interstate Agreement on Detainers] is a federal law subject to federal construction") (quotation omitted); *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (noting that congressional consent transforms an interstate compact into a law of the United States, thus presenting a federal question, and affirming Third Circuit's conclusion that it was not bound by a state court interpretation to the contrary).

State-Tribe compacts under IGRA likewise present a federal issue of national significance, and this Court should exercise its power to determine the validity of the compacts here. The prevalence of such compacts requires certainty and national uniformity, not only for citizens, but for the co-sovereign States and Tribes that enter into gaming compacts. Because the Michigan Supreme Court's erroneous interpretation of IGRA has significant implications for both federal-state and state-tribe relations, this

Court's review is particularly warranted. *Arizona v. Maypenny*, 451 U.S. 232, 239 (1981) (where a legal issue carries significance for federal-state relations, this Court pays particularly "close attention" to both state and federal law bearing on its resolution); *Kosydar v. Nat'l Cash Register Co.*, 417 U.S. 62, 65 (1974) ("We granted certiorari because the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution."); *Williams v. Lee*, 358 U.S. 217, 218 (1959) (this Court will grant certiorari to address "important question[s] of state power over Indian affairs.").

B. Indian gaming itself presents issues of national importance.

The core issues of whether Congress has delegated some of its regulatory power over Indian gaming to the States and how States can exercise that power in the compacting process are also of great national importance based purely on socioeconomic considerations, as demonstrated by recent front page articles in the Wall Street Journal and the New York Times. John R. Emshwiller & Christina Binkley, *Roll of the Dice: As Indian Casinos Grow, Regulation Raises Concerns*, Wall St. J. Aug. 23, 2004, at A1; Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1. Moreover, casino gambling is "one of the nation's fastest growing industries and most popular leisure activities." Nicholas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gambling*, 84 Cornell L. Rev. 798, 800 (1999). "[H]igh-stakes casinos boast more visitors than the aggregate attendance of all professional and college football games,

arena and symphony concerts, and theatrical events combined." *Id.*

Existing tribal gaming facilities are extremely lucrative, bringing in gaming revenue of more than $16.7 billion in 2003, up from $5.4 billion in 1995. National Indian Gaming Commission, Growth in Indian Gaming, *available at* http://www.nigc.gov/nigc/tribes/revenue-03-05.jsp. According to the FBI, the tribal gaming industry started as a $100 million industry but, since IGRA's inception, has risen to a current revenue level that exceeds the gaming revenue of Las Vegas and Atlantic City combined. FBI, Indian County Crime, *available at* http://www.fbi.gov/hq/cid/indian/indgaming.htm. And the stratospheric growth of tribal gaming shows no sign of slowing, as 291 groups are now seeking federal recognition as tribes, nearly all of them receiving significant financial backing from non-Indian investors hoping to reap substantial profits from casino management contracts. Iver Peterson, *Would-Be Tribes Entice Investors*, N.Y. Times, Mar. 29, 2004, at A1.

As tribal gaming has become more widespread, so have the societal costs. Negative impacts include over-consumption of public resources such as roads, water, fire, police, and ambulance services. Jan Golab, *The Festering Problem of Indian "Sovereignty": The Supreme Court ducks. Congress sleeps. Indians rule*, The American Enterprise, Sept. 2004, at 26. Casino workers moving into an area with a new casino are often low-income, which strains housing markets and overloads public schools. *Id.* Casinos are associated with increased bankruptcies, foreclosures, divorces, child abuse, and crime. *Id.* Property devaluation near casinos, and lost taxes as tax-exempt tribes buy up surrounding property and businesses, have the potential to devastate local governments' ability to provide

the services that the tribes share, particularly where the tribes are not paying for such services. *Id.* It is no surprise that many "states now facing the biggest budget deficits are also the states with the largest number of tax-exempt Indian casinos and tax-evading tribal businesses." *Id.* at 31.

The simple economics and high societal costs of tribal gaming highlight the need for consistency in IGRA's judicial interpretations and judicial scrutiny of gaming compact validity. The practical effect of the Michigan Supreme Court's decision is to leave such gaming essentially unregulated, since Congress has attempted to delegate regulatory authority to the States, and the Michigan Supreme Court has now disclaimed the States' right to regulate. Again, this Court's immediate intervention is required.

III. The Decision Below Incorrectly Interprets IGRA.

The Michigan Supreme Court premised its decision on its determination that Congress delegated no regulatory power to the States over tribal gaming when it enacted IGRA:

> Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather it simply incorporates state laws as the federal law governing nonconforming tribal gaming. Thus, although a state's gaming laws apply in the absence of a tribal-state compact, they apply only *as federal law*. It follows that when the Legislature approves a tribal-state compact, it approves a change in *federal* law rather than its own.

(App., 14 (emphasis in original).) The Michigan Supreme Court referred to this as the "federalization" of state law, and found that Congress, through IGRA, chose to apply

state law "for purposes of expediency" and not as a means of delegating regulatory power to the states. (App., 14-15; *accord* App., 15 ("Although 18 USC 1166(d) effectively 'borrows' Michigan law for purposes of federal law, it does not delegate any regulatory power to the states.").)

The Michigan Supreme Court's ruling runs contrary to the express and unambiguous language of IGRA. *See* 18 U.S.C. § 1666(a) (subject to a compact, "all State [gambling] laws . . . shall apply in Indian country"). The ruling also ignores history, which demonstrates that Congress enacted IGRA precisely to grant regulatory authority over tribal gaming to States.

That history begins with this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), invalidating California's attempt to enforce a state penal statute against tribes that operated bingo halls. Congress responded to the opinion by enacting IGRA, attempting to reestablish the regulatory power of States over tribal gaming. *See Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 472 (6th Cir. 1998) ("*Congress enacted the IGRA* in 1988 and thereby created a framework for the regulation and management of gambling on Indian land . . . *which included a role for the states in the regulation of Indian gaming*. . . .") (emphasis added). As the Senate Committee Report explained, "existing State regulatory systems" provided the best mechanism for regulating casino gaming, because "there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place." S. Rep. No. 446, 100th Cong., 2d Sess. 12, 13 (1988); *see also Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1549 (10th Cir. 1997) (quoting S. Rep. No. 100-446, at 13-14), *cert. denied*, 522 U.S. 807;

25 U.S.C. § 2701(3) ("[E]xisting Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands.").[2]

Congress ensured state regulatory involvement under IGRA in two ways. The first is Section 1166(a)'s application of State gambling laws to Indian country. As dissenting Justice Markman explained, "the Congress [through the enactment of § 1166], provided the consent to the states that was lacking in *Cabazon* to regulate tribal gaming in the same manner and to the same extent that states regulate gambling elsewhere within their borders." (App., 64; *id.* at 65-66 (quoting *Artichoke Joe's*).)[3] Justice Markman further noted, "[i]t appears that states [even] have some enforcement powers under § 1166 – civil enforcement powers." (App., 61 n.28 (citing *United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1322 (C.D. Cal. 1997)).)

---

[2] In fact, some members of Congress announced that they opposed IGRA precisely because it would allow States a regulatory role with regard to Class III gaming. *See, e.g.,* 134 Cong. Rec. 24,029 (Sen. Burdick); *id.* at 24,030 (Sen. Daschle); *id.* at 25,379-25,380 (Rep. Sikorski); *id.* at 25,380 (Rep. Frenzel).

[3] *See also United States v. Santa Ynez Band of Chumash Mission Indians*, 983 F. Supp. 1317, 1323 (C.D. Cal. 1997) ("An essential element of [*Cabazon*] was that Congress had not acted specifically to make state gambling laws applicable in Indian country. This decision made clear that it would require a new act of Congress for states to have any effective ability to prevent or regulate Indian gaming. IGRA was enacted in direct response to *Cabazon*. . . . Subsection (a) of § 1166 expressly makes state gambling laws applicable in Indian country . . . ."); *Hotel Employees & Restaurant Employees Int'l Union v. Davis*, 981 P.2d 990, 1008-1009 (Cal. 1999) (confirming that federal law does not "preempt" state laws concerning gambling in Indian country, but instead applies them).

Second, Congress ensured state regulatory and policy-making power regarding Indian gaming through the compacting process. Under 25 U.S.C. § 2710(d), a Tribe and a State may opt out of the otherwise applicable state rules under 18 U.S.C. § 1166 and arrange for lawful casino gambling under the regulatory terms of a State-Tribe compact. *See* 25 U.S.C. § 2710(d)(1) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ."); Select Committee on Indian Affairs Report, S. Rep. No. 100-446, at 1-6 ("It is also true that [IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact."); *Finney,* 836 P.2d at 1171 (quoting same). And IGRA expressly contemplates that an appropriate compact will apply state regulatory law to Indian gaming. 25 U.S.C. § 2710(d)(3)(C) ("Any Tribal-State compact . . . may include provisions relating to . . . (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity. . . .");[4] 25 U.S.C. § 2710(d)(5) ("Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent

[4] As noted by Justice Markman, "IGRA itself contemplates that states will confront several policy choices when negotiating gaming compacts. Congress provided that potential conflicts may be resolved in the compact itself, explicitly noting the many policies affected by tribal gaming compacts." (App., 84 (quoting *Pataki*, 798 N.E.2d at 1060 (citing 25 U.S.C. § 2710(d)(3)(C) as recognizing the numerous policy choices involved)).)

that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect."). Moreover, while IGRA requires that states negotiate "in good faith" to enter into a compact that establishes the desired regulatory framework, 25 U.S.C. § 2710(d)(3)(A), this obligation in no way diminishes the substantial regulatory and policy-making authority provided to the states.[5]

Thus, under IGRA, the State-Tribe compact is a tool that enables a state to regulate Indian gambling conducted within its borders:

> [T]hrough § 2710(d), the Congress provided the states with a direct means of "escap[ing] the pre-emptive force of federal and tribal interests" regarding class III gaming on Indian land by granting states the power to *specifically* make lawful and regulate casino gambling on particular Indian land, as long as such actions arise from the negotiation process and are otherwise in accordance with IGRA.

(App., 66 (quoting *Cabazon*, 480 U.S. at 221) (underlined emphasis added).)

The State-Tribe compacts are legislation because they set forth an extensive regulatory framework governing tribal gaming activities, Compacts at §§ 3-10, and effectively change Michigan gaming laws that apply to specific

---

[5] "The fact that federal law imposes some limits on the state's power to regulate in a specific area simply cannot mean any legislative action touching upon such an area is not actually 'legislation.'" (App., 93 (Markman, J., dissenting in part).)

Indian lands.[6] For example, the compacts: specify who may be hired, the types of games that may be played, and who may wager at such games; set forth accounting and record keeping requirements, requirements for posting information in casinos, and standards for gambling supplies and equipment purchased by the Tribes; change the minimum legal gambling age from 21 to 18; expand the category of felons eligible to be hired as managerial casino employees; change the minimum age of eligibility for casino employment from 21 to 18; decide how much revenue to raise for the state and where that revenue will go; determine the jurisdictional balance between the State of Michigan and the Tribes; determine how many casinos each Tribe will be allowed to have in Michigan; bar casinos within 150 miles of Detroit to protect the Detroit casinos from competition; and require local units of government to create local revenue sharing boards to receive and distribute payments due from the Tribes.[7]

Further, the compact negotiation process requires the resolution of "multiple policy-making decisions of great consequence to this state, the most significant of which was the initial decision to make lawful what was otherwise unlawful – casino gambling on the subject Indian lands." (App., 82.) As Justice Markman explained:

---

[6] Even the Michigan Court of Appeals in this case acknowledged that "[t]he terms of the compact contained various regulatory provisions." (App., 112.)

[7] The Michigan Supreme Court actually found that the compacts did not obligate local units of government to create local revenue sharing boards. (App., 17.) This finding is incredible in light of the unambiguous, mandatory language of the compacts ("a Local Revenue Board shall be created. . . ."). (App., 79-80 n.42.)

> What is important to understand is that, in the absence of the challenged tribal-state compacts, gambling on the subject Indian land was *unlawful*.
>
> * * *
>
> Thus, it becomes clear that, before the challenged compacts existed, the tribes would have been engaging in an unlawful activity had they endeavored to operate their respective casinos. It necessarily follows that the compacts had the intended purpose, and the effect, of altering legal rights and relations of Michigan citizens generally. The compacts purport to allow Indian tribes to lawfully engage in activities that would otherwise be unlawful.

(App., 76-79 (emphasis in original).)

In sum, the Michigan Supreme Court's interpretation of IGRA cannot be reconciled with the plain language of the statute, which is sacrosanct. Only this Court's intervention will vindicate Congressional intent as evidenced in the statutory language and history, thus protecting the regulatory role for States that Congress intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. JONKER*
DANIEL P. ETTINGER
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000
Counsel for Petitioners

**Counsel of Record*

OCTOBER 28, 2004

685 N.W.2d 221

Supreme Court of Michigan.

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and Laura Baird, Plaintiffs-Appellants,
v.
The STATE of Michigan, Defendant-Appellee,
and
North American Sports Management Company, Inc, IV, and Gaming Entertainment, LLC., Intervening Defendants-Appellees.

Docket No. 122830.
Calendar No. 6.

Argued March 11, 2004.
Decided July 30, 2004.

Warner Norcross & Judd LLP (by *Robert J. Jonker, William C. Fulkerson, Norbert F. Kugele*, and *Daniel K. DeWitt*), Grand Rapids, MI, for the Taxpayers of Michigan Against Casinos.

Barris, Sott, Denn & Driker, P.L.L.C. (by *Eugene Driker* and *Thomas F. Cavalier*), Detroit, MI, for the state of Michigan.

Dykema Gossett PLLC (by *Richard D. McLellan, Bruce G. Davis, R. Lance Boldrey*, and *Kristine N. Tuma*), Lansing, MI, for intervening defendant Gaming Entertainment, LLC.

Rhoades McKee (by *Bruce W. Neckers* and *Bruce A. Courtade*), Grand Rapids, MI, for the Grand Rapids Area Chamber of Commerce.

Senate Majority Counsel (by *Alfred H. Hall, Michael G. O'Brien*, Phillip A. Hendges, and Pamela S. Haynes),

Lansing, for Senate Majority Leader Ken Sikkema and Senator Shirley Johnson.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Kevin J. Moody* and *Jaclyn Shoshana Levine*), Lansing, MI, for the Sault Ste. Marie Tribe of Chippewa Indians.

Kanji & Katzen, PLLC (by *Riyaz A. Kanji*), Ann Arbor, MI, and Drummond, Woodsum & MacMahon (by *Kaighn Smith* and *Robert Gips*), Portland, Maine, for the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Pokagon Band of Potawatomi Indians of Michigan.

James A. Bransky, General Counsel, Petoskey, MI, for the Little Traverse Bay Bands of Odawa Indians.

Michael G. Phelan, Dowagiac, MI, for the Pokagon Band of Potawatomi Indians.

Wheeler Upham, P.C. (by *Geoffrey L. Gillis*), Grand Rapids, MI, and Sonosky, Chambers, Sachse, Endreson & Perry, LLP (by *William R. Perry* and Mary P. Pavel), Washington, DC, for the Nottawaseppi Huron Band of Potawatatomi.

William Brooks, Mainstee, MI, for the Little River Band of Ottawa Indians.

Schuitmaker, Cooper & Schuitmaker, P.C. (by *Harold Schuitmaker*), Paw Paw, MI, for the city of New Buffalo.

Dewane, Peterson, McMahon & Cullitan, P.L.C. (by *David M. Peterson*), St. Joseph, MI, for the New Buffalo Township.

Opinion

CORRIGAN, C.J.

In this declaratory action, we must determine: (1) whether House Concurrent Resolution (HCR) 115 (1998), the Legislature's approval by resolution of tribal-state gaming compacts, constituted "legislation" and therefore violated Const. 1963, art. 4, § 22; (2) whether the compacts' amendatory provision providing that the Governor may amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2; and (3) whether HCR 115 is a local act in violation of Const. 1963, art. 4, § 29.

We hold that the Legislature's approval of the compacts through HCR 115 did not constitute legislation. In approving those compacts by resolution, the Legislature did not modify Michigan law in any respect; instead, the Legislature simply expressed its approval of valid contracts between two independent, sovereign entities. Although Michigan's gaming law would have applied to gaming on tribal lands in the absence of a tribal-state compact, it applied only as a matter of *federal* law. Compacts establishing the terms of class III gaming on tribal lands modified only federal law. Therefore, our Constitution does not require that our Legislature express its approval of these compacts through bill rather than resolution.

We further hold that although the issue of the amendment provision in the compacts may now be ripe for review, the lower courts have yet to review this issue and make any specific findings regarding whether the amendatory provision in the compacts, as now invoked by Governor Granholm, violates the separation of powers

provisions found in Const 1963, art 3, § 2. Finally, we hold that HCR 115 is not a "local act" and therefore does not violate Const. 1963, art. 4, § 29. Accordingly, we remand the amendment provision issue to the Court of Appeals for consideration, but otherwise affirm the decision of the Court of Appeals.

I. FACTUAL HISTORY AND PROCEDURAL POSTURE

A. BACKGROUND: FEDERAL LAW REGARDING TRIBAL GAMING

Knowledge of the underlying federal law is necessary to understand the factual posture of this case. In *California v. Cabazon,* 480 U.S. 202, 207, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), the United States Supreme Court held that state laws may only be applied to tribal lands "if Congress has expressly so provided." The Court held that because Congress had not provided for the regulation of tribal gaming, a state could only prohibit gaming on tribal lands if the state completely prohibited all gaming within its borders.

In response to *Cabazon,* Congress passed the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq.,* which divides gaming activities into three classes. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 USC 2703(6). Class II gaming includes bingo and card games (but not banking card games) that are played in conformance with state laws and regulations regarding hours of operation and limitations on wagers or pot sizes. 25 USC 2703(7). Class

III gaming includes all other forms of gambling, including casino gaming. 25 USC 2703(8).

At issue in this case is class III gaming. Under IGRA, tribes may engage in class III gaming only pursuant to a tribal-state compact that is approved by the Secretary of the Interior. 25 USC 2710(d) provides, in relevant part:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> * * *
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.
>
> * * *
>
> (3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.[1]

---

[1] In *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the United States Supreme Court held that 25 USC 2710(d)(7), which permits Indian tribes to sue a state in federal court when that state has refused to negotiate in good faith for a tribal-state compact, was an unconstitutional violation of state sovereign

(Continued on following page)

* * *

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

* * *

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations

---

immunity as preserved by the Eleventh Amendment of the United States Constitution.

made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

Through § 2710(d), Congress expressly provided for tribal-state negotiations regarding class III gaming. Through this compacting process, the tribes and the states may agree to the terms governing such gaming.

B. FACTUAL HISTORY

The compacts at issue in this case were first signed by Governor Engler and four Indian tribes[2] in January of 1997. Each compact provided that it would take effect after "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature."[3] The compacts were modified and re-executed in December 1998, and the Legislature then approved the compacts by resolution through HCR 115.[4]

The validity of the 1998 compacts was challenged through several lawsuits.[5] Plaintiffs filed this suit against

---

[2] These tribes are the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi. The Little Traverse Bay Band and the Little River Band currently operate casinos.

[3] See § 11 of the compacts.

[4] Although a bill must be passed by a majority of elected and serving members of the Legislature, a resolution may be passed by a majority vote of those legislators present at the time, provided a quorum is present. The House of Representatives approved the 7compacts by a resolution vote of 48 to 47, and the Senate followed suit by a resolution vote of 21 to 17.

[5] The Sault Ste. Marie Tribe of Lake Superior sued in federal court to enjoin the operation of the new casinos, but the United States Court of Appeals for the Sixth Circuit dismissed this suit on standing

(Continued on following page)

defendant in the Ingham Circuit Court, seeking a declaratory judgment that the compacts do not comport with various constitutional provisions. Plaintiffs argue that the compacts amount to legislation and, therefore, pursuant to Const 1963, art 4, § 22 the Legislature was required to adopt them by bill rather than approve them by resolution. The circuit court held that the compacts should have been approved by bill. The Court of Appeals reversed the circuit court decision, concluding that the compacts do not constitute legislation because they contain no enforcement provision that would ensure that their terms are satisfied and because the power of the state to legislate in this area is preempted by federal law. The Court of Appeals opined that the compacts constitute mere contracts and, therefore, approval by resolution was not constitutionally infirm.

Plaintiffs also contend that the provision in the compacts that purports to empower the Governor to amend them without legislative approval violates Const 1963, art 3, § 2, the "separation of powers" doctrine. The circuit court agreed with plaintiffs. The Court of Appeals, however, reversed the decision of the circuit court on the basis that the amendatory provision issue was not ripe for review because the Governor had not yet attempted to amend the compacts.

Plaintiffs further argue that the compacts violate Const 1963, art 4, § 29, the "local acts" clause. The circuit

---

grounds. *Sault Ste Marie Tribe v. United States,* 288 F.3d 910 (C.A.6, 2002). Two state legislators also challenged the approval of the Secretary of Interior of Michigan's 1998 compacts, but that suit was also dismissed on standing grounds by the United States Court of Appeals for the Sixth Circuit. *Baird v. Norton,* 266 F.3d 408 (C.A.6, 2001).

court disagreed, holding that art 4, § 29 is not implicated. The Court of Appeals agreed and affirmed the circuit court on this issue.

This Court granted leave to appeal.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Van v. Zahorik,* 460 Mich. 320, 326, 597 N.W.2d 15 (1999). The constitutionality of a legislative act is a question of law that is reviewed de novo. *DeRose v. DeRose,* 469 Mich. 320, 326, 666 N.W.2d 636 (2003).

III. THE LEGISLATURE'S APPROVAL OF THE COMPACTS WAS NOT LEGISLATION

Resolution of whether HCR 115 constituted legislation necessarily turns on the definition of "legislation." Plaintiffs argue that the Legislature's approval of the compacts must be legislation because HCR 115 had the effect of altering legal rights and responsibilities. We find this definition of "legislation" overly simplistic. Although it is true that legislation alters legal rights and responsibilities, not everything that alters legal rights and responsibilities can be considered legislation. Legal rights and responsibilities may also be altered through contracts. Therefore, the fact that the legal rights or responsibilities of the parties involved may have been altered in some way is not dispositive.

We hold that a more accurate definition of "legislation" is one of unilateral regulation. The Legislature is never required to obtain consent from those who are

subject to its legislative power. *Boerth v. Detroit City Gas Co.,* 152 Mich. 654, 659, 116 N.W. 628 (1908). This unilateral action distinguishes legislation from contract: "'The power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two.'" *Detroit v. Michigan Pub. Utilities Comm.,* 288 Mich. 267, 288, 286 N.W. 368 (1939), quoting *City of Kalamazoo v. Kalamazoo Circuit Judge,* 200 Mich. 146, 159-160, 166 N.W. 998 (1918).

Here, the Legislature was required to approve the compacts only as the result of negotiations between two sovereigns: the Legislature could not have unilaterally exerted its will over the tribes involved. Because the tribes' consent is required by federal law, the compacts can only be described as contracts, not legislation.

A. THE STATE'S LIMITED ROLE UNDER IGRA

In order to understand the contractual nature of the compacts, it is essential to understand the state's limited role under federal law generally, as well as IGRA. Since at least 1832, the United States Supreme Court has recognized tribal sovereignty. In *Worcester v. Georgia,* 6 Pet. 515, 31 U.S. 515, 557, 8 L.Ed. 483 (1832), the United States Supreme Court noted that the tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." This tribal sovereignty is limited only by Congress: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress

and is subject to complete defeasance." *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Similarly, only the federal government or the tribes themselves can subject the tribes to suit; tribal immunity "is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.,* 523 U.S. 751, 754, 756, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). Through IGRA, however, Congress has permitted the states to negotiate with the tribes through the compacting process to shape the terms under which tribal gaming is conducted. The states have no authority to regulate tribal gaming under the IGRA unless the tribe explicitly consents to the regulation in a compact.

Although 25 USC 2710(d)(1)(C) provides that class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, that does not mean the states have any authority to regulate class III gaming activities in the absence of a compact. States may not enforce the terms of IGRA; rather, the only enforcement provided for in the IGRA is through the federal government. The IGRA provides that civil enforcement lies only with the tribes themselves or with the National Indian Gaming Commission, which was created by IGRA. 25 USC 2713. Judicial review of the Commission's decision may only be obtained in federal court. 25 USC 2714. Similarly, criminal enforcement is left solely to the federal government under 18 USC 1166(d). See also *Gaming Corp. of America v. Dorsey & Whitney,* 88 F.3d 536, 545 (C.A.8, 1996) ("Every reference to court action in IGRA specifies federal court jurisdiction. . . . State courts are never mentioned."). In other words, although it may be "unlawful" for the tribes to engage in class III gaming absent a compact, the Legislature is powerless to regulate or prohibit such

gaming. State legislatures have no regulatory role under IGRA aside from that negotiated between the tribes and the states.

In *Gaming Corp., supra* at 546-547, the court explained:

> Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. They are a creation of federal law, and IGRA prescribes "the permissible scope of a Tribal-State compact, see § 2710(d)(3)(C)." *Seminole Tribe of Florida v. Florida,* [517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).] Such compacts must also be approved by the Secretary of the Interior. § 2710(d)(3)(B).
>
> * * *
>
> Congress thus chose not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis. Rather, it created a fixed division of jurisdiction. If a state law seeks to regulate gaming, it will not be applied. If a state law prohibits a class of gaming, it may have force. The courts are not to interfere with this balancing of interests, they are not to conduct a *Cabazon* balancing analysis. This avoids inconsistent results depending upon the governmental interests involved in each case. With only the limited exceptions noted above, Congress left the states without a significant role under IGRA unless one is negotiated through a compact.

The only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact.

In fact, our Legislature has recognized that the state's regulatory authority cannot extend to tribal gambling. MCL 432.203(5) provides that state regulation of tribal casinos can only occur "[i]f a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land." Absent such federal authorization, MCL 432.203(2)(d) acknowledges that the state's gambling regulatory requirements do *not* apply to "[g]ambling on Native American land and land held in trust by the United States for a federally recognized Indian tribe on which gaming may be conducted under [IGRA]."

Further, contrary to plaintiffs' contentions, 18 USC 1166 does not change this analysis. Section 1166 provides:

> (a) Subject to subsection (c), *for purposes of Federal law,* all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be

guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USC 2710(d)(8)] that is in effect.

(d) *The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USC 2710(d)(8)], or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.* [Emphasis added.]

Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather, it simply incorporates state laws as the federal law governing nonconforming tribal gaming. Thus, although a state's gaming laws apply in the absence of a tribal-state compact, they apply only *as federal law.* It follows that when the Legislature approves a tribal-state compact, it approves a change in *federal* law rather than its own.

Moreover, this "federalization" of state law regulating gambling does not give a state enforcement power over violations of state gambling laws on tribal lands because "the power to enforce the incorporated laws rests solely

with the United States." *United Keetoowah Band of Cherokee Indians v. Oklahoma,* 927 F.2d 1170, 1177 (C.A.10, 1991). The state remains powerless to assert any regulatory authority over tribal gaming *unless* the tribes have assented to such authority in a compact under IGRA. *AT & T Corp. v. Coeur D'Alene Tribe,* 295 F.3d 899, 909 (C.A.9, 2002).

Although 18 USC 1166(d) effectively "borrows" Michigan law for purposes of federal law, it does not delegate any regulatory power to the states. Section 1116(d) is not a way to extend the state's power to regulate tribes through the federal government. Rather, the federal government may conclude at any time that it will no longer apply state law and so amend the IGRA. In other words, the fact that, for purposes of expediency, the federal government has currently chosen to apply Michigan law for purposes of federal law does not mean that it will always choose to do so. Therefore, § 1166(d) cannot be viewed as a delegation of regulatory power to the states.

B. THE CONTRACTUAL NATURE OF COMPACTS

As explained above, IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. The Legislature is prohibited from unilaterally imposing its will on the tribes; rather, under IGRA, it must negotiate with the tribes to reach a mutual agreement.[6] As

[6] IGRA even prohibits the state from frustrating the tribe's desire to enter into class III gaming by refusing to negotiate. In the event that a state will not negotiate or an agreement cannot be reached, although under *Seminole Tribe* the state may not be sued, it appears that the

(Continued on following page)

further noted above, the hallmark of legislation is unilateral imposition of legislative will. Such a unilateral imposition of legislative will is completely absent in the Legislature's approval of tribal-state gaming compacts under IGRA. Here, the Legislature's approval of the compacts follows the assent of the parties governed by those compacts. Thus, the Legislature's role here requires mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating. *Rood v. Gen. Dynamics Corp.,* 444 Mich. 107, 118, 507 N.W.2d 591 (1993). See *Confederated Tribes of the Chehalis Reservation v. Johnson,* 135 Wash.2d 734, 750, 958 P.2d 260 (1998) ("Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.")

Further, the compacts approved by HCR 115 do not apply to the citizens of the state of Michigan as a whole; they only bind the two parties to the compact. Legislation "looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power." *Dist of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 477, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), quoting *Prentis v. Atlantic Coast Line Co.,* 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150 (1908). Here, the compacts approved by HCR 115 have no application to those subject to legislative power; rather, they only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities. Under the terms of the compacts, the tribes themselves, not the state, regulate the conduct of class III

---

tribe may approach the Secretary of the Interior, who can approve a compact under 25 USC 2710(d)(8).

gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts.

> Similarly, in approving the compacts at issue here, the Legislature has not dictated the rights or duties of those other than the contracting parties. Despite plaintiffs' arguments to the contrary, we find that § 18 of the compacts does not obligate local units of government to create local revenue sharing boards. Indeed, because the local government units are not parties to the contract, it would not be possible for the compacts to impose *any* obligations on the local governments. Third parties cannot be bound by the terms of the compacts. Instead, the compacts make local units of government third-party beneficiaries of the compacts, with the creation of the revenue sharing boards simply a condition precedent to receiving those benefits. A party is a third-party beneficiary if the promisor "has undertaken to give or do or refrain from doing something directly to or for said person." MCL 600.1405(1). Here, the tribes have promised to give 2% of their net earnings to local communities, provided those communities create the revenue sharing boards to receive and disburse the payments. If the local governments choose not to create the sharing boards, they simply can no longer receive the benefit of the funds. But they are under no *obligation* to create the revenue sharing boards and receive the benefit granted by the tribes.

Further, we reject plaintiffs' argument that the Legislature's approval by resolution has affected the rights of state citizens by setting age limitations for gaming or employment in the tribal casinos. These restrictions are not restrictions on the citizens of Michigan; rather, they are restrictions only on the *tribes*. The compacts provide

the minimum requirements that the *tribes* agree to use in hiring and admitting guests to the casinos. The state has no power to regulate the casinos or enforce violations of the compact, but must use the dispute resolution procedure provided in the compacts if a violation occurs.

Finally, we hold that the Legislature's approval of the tribal-state compacts does not create any affirmative state obligations. The compacts do not create any state agencies or impose any regulatory obligation on the state. The state also has no responsibility to enforce the compacts' requirements – that responsibility falls on the tribes alone. In this way, the compacts here can be distinguished from those at issue in the cases relied upon by plaintiffs. In *Kansas v. Finney,* 251 Kan. 559, 836 P.2d 1169 (1992), the compact at issue created a state gaming agency responsible for monitoring the tribe's compliance with the contract, and the compact was not submitted to the legislature for any form of approval. The court found that, under Kansas law, the creation of a state agency was a legislative function. Absent an appropriate delegation of power by the legislature or legislative approval of the compact,[7] the compacts could not bind the state to the increased obligations. Unlike the compact in *Finney,* however, the compacts at issue here do not create any state agencies and were presented to the Legislature for approval.

Similarly, in *New Mexico v. Johnson,* 120 N.M. 562, 904 P.2d 11 (1995), the compacts authorized more forms of gaming than were otherwise permitted in New Mexico. As in *Finney,* the compacts were not presented to the state

[7] The court did not specify what form that legislative approval would have to take.

legislature for any form of approval. The court held that the governor could not enter into the compacts and thereby create new forms of gaming without "any action on the part of the legislature." *Id.* at 574, 836 P.2d 1169. Unlike the compacts in *Johnson,* the compacts here do not create new forms of gaming and were presented to the Legislature for approval. Thus, the compacts do not impose new obligations on the citizens of the state subject to the Legislature's power; they simply reflect the contractual terms agreed to by two sovereign entities.

C. LEGISLATIVE APPROVAL VIA RESOLUTION WAS APPROPRIATE

Once it is determined that HCR 115 did not constitute legislation, we must then determine whether resolution was an appropriate method of legislative approval of the compacts. We therefore turn to our Constitution. Our Constitution does not prohibit the Legislature from approving contracts, such as the compacts at issue here, by concurrent resolution. Unlike the federal constitution, our Constitution "is not a grant of power to the legislature, but is a limitation upon its powers." *In re Brewster Street Housing Site,* 291 Mich. 313, 333, 289 N.W. 493 (1939). Therefore, "the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States." *Attorney General v. Montgomery,* 275 Mich. 504, 538, 267 N.W. 550 (1936). This has been discussed by this Court in the past by analogizing our Legislature to the English Parliament. See *Young v. City of Ann Arbor,* 267 Mich. 241, 243, 255 N.W. 579 (1934), in which this Court stated:

> A different rule of construction applies to the Constitution of the United States than to the Constitution of a State. The Federal government is one of delegated powers, and all powers not delegated are reserved to the States or to the people. When the validity of an act of congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to congress. The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself.[8]

Regarding any limitations in our constitution, art 4, § 22 only requires the approval of *legislation* by bill, but is silent regarding the approval of contracts.

We have held that our Legislature has the general power to contract unless there is a constitutional limitation. *Advisory Opinion on Constitutionality of 1976 Pa. 240,* 400 Mich. 311, 254 N.W.2d 544 (1977). It is acknowledged by all that our Constitution contains no limits on the Legislature's power to bind the state to a contract with a tribe; therefore, because nothing prohibits it from doing so, given the Legislature's residual power, we conclude

---

[8] See also *Thompson v. Auditor General,* 261 Mich. 624, 642, 247 N.W. 360 (1933), in which the Court stated:

> The power of the legislature of this State is as omnipotent as that of the parliament of England, save only as restrained by the Constitution of the United States and the Constitution of this State. . . . 1 Cooley, Constitutional Limitations (8th Ed.), p. 354.

that the Legislature has the discretion to approve the compacts by resolution.[9]

This understanding of legislative power is well-established. Our Legislature has in the past used the resolution process to ratify amendments of the federal constitution. This Court has declared the resolution process proper in such a circumstance because the Legislature did not engage in a legislative act that enacted a law, but merely expressed its assent to the proposed amendment. *Decher v. Secretary of State,* 209 Mich. 565, 571, 177 N.W. 388 (1920). In the same way, the Legislature here is merely expressing its "assent" to the compacts through HCR 115.

More importantly, because our Legislature had the discretion to approve the compacts by resolution rather than by bill, the courts cannot interfere with that legitimate exercise of legislative discretion. As this Court recognized long ago in *Detroit v. Hosmer Circuit Judge,* 79 Mich. 384, 387, 44 N.W. 622 (1890):

> It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to

[9] In fact, action by concurrent resolution is common when the Constitution is silent regarding the appropriate procedure. Various constitutional provisions require legislative action but fail to specify its form: Const 1963, art. 4, § 53 (appointment of auditor general); Const. 1963, art. 11, § 5 (approval of certain civil service pay increases); Const 1963, art. 4, § 17 (establishing special legislative committees); and Const. 1963, art. 10, § 5 (designation of land as part of state land reserve). In such situations, the Legislature has historically acted by concurrent resolution.

> their exercise, no outside authority can intermeddle with them. . . .

Therefore, this Court should not interfere with the Legislature's discretionary decision to approve the compacts by resolution.

IV. THE BLANK/CHADHA FACTORS

For the above reasons, we are not persuaded by plaintiffs' argument that the factors set forth in the lead opinion in *Blank v. Dep't of Corrections,* 462 Mich. 103, 611 N.W.2d 530 (2000), adopted from *Immigration & Naturalization Service v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983), apply to this case. *Blank* and *Chadha* involved the Legislature's power to alter or amend the statute delegating rule-making authority without doing so by statute. *Blank* held that once the Legislature grants power to an agency by statutory action, it cannot then diminish or qualify that power except by further statutory action. This "legislative veto" practice at issue in *Blank* also had a significant state constitutional history. Const 1963, art 4, § 37 allowed temporary legislative vetoes of agency regulations between legislative sessions. In 1984, the people rejected a proposal to amend § 37 and permit the type of permanent legislative veto at issue in *Blank.* The fact that the legislative veto at issue in *Blank* was not permitted by the Constitution and had been rejected by the people further illuminates the *Blank* decision.

No such environment exists here, however, as our Constitution is silent regarding the proper form of legislative approval of tribal-state gaming compacts under IGRA and the people have not expressed a view on this question.

Therefore, we do not believe that the *Blank/Chadha* analysis should be applied here.

In response to the Justice Markman's dissent, however, we note that even were the *Blank/Chadha* analysis to be applied, the factors do not demonstrate that the Legislature's approval of the compacts was an act of legislation.

A. THE COMPACTS DO NOT ALTER THE LEGAL RIGHTS, DUTIES, AND RELATIONS OF PERSONS OUTSIDE THE LEGISLATIVE BRANCH

To make sense, this factor must apply to persons outside the legislative branch who are subject to the Legislature's authority. Here, the compacts do not give the state the power to alter the rights, duties, or relations of anyone subject to the Legislature's authority. Rather, the compacts only set forth the parameters the tribes agree will apply to their operation of gaming facilities. The Legislature has no regulatory duty under the compacts, nor do the compacts confer any "rights" upon the state other than contractual rights. For example, although the state may inspect tribal facilities and records, it has no power to enforce those provisions. Any contractual disputes under the compacts must be submitted to the dispute resolution procedure outlined in the compacts. All duties and restrictions in the compacts fall on the tribes themselves, who are sovereign entities and have consented to the restrictions and additional duties.

B. THE RESOLUTION DID NOT SUPPLANT LEGISLATIVE ACTION

Unlike the actions taken in *Blank,* HCR 115 did not have the effect of amending or repealing existing legislation when it approved the compacts. As noted above, given the Constitution's silence regarding the form of approval necessary for tribal-state gaming compacts, the Legislature had the discretion to approve the compacts by resolution. Further, as explained above, the compacts do not impose any affirmative obligations on the state, create rules of conduct for Michigan citizens, or create new state agencies. Such changes would require legislation, but are absent from the compacts. Therefore, legislation is not required and this Court should not interfere with the Legislature's discretion in approving the compacts by concurrent resolution.

C. THE COMPACTS DO NOT INVOLVE POLICY DETERMINATIONS REQUIRING LEGISLATION

First, it must be remembered that not all policy decisions made by the Legislature are required to be in the form of legislation. See *Blank, supra* at 170, 611 N.W.2d 530 (Cavanagh, J.). As the United States Supreme Court explained in *Yakus v. United States,* 321 U.S. 414, 424, 64 S.Ct. 660, 88 L.Ed. 834 (1944), "[t]he essentials of the legislative function are the determination of legislative policy *and its formulation and promulgation as a defined and binding rule of conduct. . . .*" (Emphasis added.) Here, HCR 115 neither promulgated a legislative policy as a defined and binding rule of conduct nor applied it to the general community. Instead, HCR 115 simply assented to the negotiated contract between two sovereign entities, recognizing that the compacts created no new legal rights or duties for the state or its citizens. Indeed, HCR 115

could never be considered a "promulgation of a legislative policy as a defined and binding rule of conduct" because the Legislature lacks the authority to bind the tribes at all. Without the tribes' approval, the compacts have no force. Through IGRA, Congress has determined that states may not unilaterally impose their will on the tribes regarding gaming; rather, the states may only negotiate with the tribes through the compacting process.

D. *Chadha's* Constitutional Factor is Not Applicable Given the Nature of Our State Constitution

As noted above, our Constitution differs from the federal constitution: the federal constitution *grants* Congress its power, while our Constitution *limits* the plenary power of our Legislature. As this Court has recognized:

> A different rule of construction applies to the Constitution of the United States than to the Constitution of a state. The federal government is one of delegated powers, and all powers not delegated are reserved to the states or to the people. When the validity of an act of Congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to Congress. The legislative power, under the Constitution of a state, is as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the state itself. [*Young v. Ann Arbor,* 267 Mich. 241, 243, 255 N.W. 579 (1934).]

Thus, the fourth *Chadha* factor, which was not applied in *Blank,* is inapplicable here because our Constitution does not *grant* authority to the Legislature, but

instead limits the Legislature's plenary authority. As explained above, our Constitution's silence regarding the form of approval needed for tribal-state gaming compacts, therefore, does not lead to the conclusion that the Legislature is prohibited from approving the compacts by resolution; rather, it leads to the conclusion that the form of the approval is within the discretion of the Legislature.

V. THE AMENDMENT PROVISION ISSUE SHOULD BE REMANDED

Although we agree with plaintiffs that Governor Granholm's recent amendments make the amendment provision issue ripe for review, the lower courts have not yet been able to assess this issue since the amendments. It is not proper for us to do so now. Therefore, we remand this issue to the Court of Appeals to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2. The Court of Appeals should remand to the trial court if it determines that further fact-finding is necessary to resolve the issue.

VI. HCR 115 Does Not Violate Const 1963, art 4, § 29

The "local act" provision of art 4, § 29 of Michigan's Constitution provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by

> a majority of the electors voting thereon in the district affected. . . .

In *Hart v. Wayne Co.,* 396 Mich. 259, 240 N.W.2d 697 (1976), this Court considered whether a provision of the municipal courts of record act requiring Wayne County to supplement salaries for recorder's court judges constituted a "local act" subject to Const 1963, art 4, § 29. We held that the provision did not constitute a "local act" because a recorder's court performs state functions and the funding of such a court is a state function. Id. at 272, 240 N.W.2d 697. In *Attorney General ex rel Eaves v. State Bridge Comm.,* 277 Mich. 373, 269 N.W. 388 (1936), this Court considered whether state legislation authorizing a bridge to Canada located at Port Huron constituted a local act. We held again that it did not, stating: "The bridge in question is international in character and will be used by those from all parts of both nations who desire to enter or leave the United States through Port Huron." *Id.* at 378, 269 N.W. 388.

Hart and *Eaves,* applied to the facts of this case, lead to the same conclusion: tribal-state compacts are not "local acts." In the absence of express congressional consent, the Legislature has no authority to regulate casino gambling on Indian lands. Like the bridge in *Eaves,* Indian casinos, located as they are on tribal lands, are "international in character" and are likely to be frequented by Michigan citizens from throughout the state as well as by members of various Indian tribes. Therefore, the approval of state compacts regarding Indian casinos pursuant to IGRA constitutes a unique state function with interests "international in character," rather than a function of a local unit of government with predominantly local interests. Thus, we hold that the compacts are not "local acts."

Further, tribal lands subject to compact negotiations are declared as such not by the state or even by the tribes, but by the Department of the Interior. The Department of the Interior has thus far granted to the tribes lands located in the counties specified in the compacts.[10] If, however, the department were to grant to a tribe lands located outside such counties, IGRA would direct the state to negotiate in good faith with the tribe to reach a compact applicable to that land as well. For this additional reason, we are not persuaded that the compacts are "local acts" merely because they reference those specific counties in which the tribes have thus far been granted lands by the department.

Accordingly, we affirm the decision of the Court of Appeals that the compacts do not violate Const. 1963, art. 4, § 29, albeit for the reasons expressed above.

VII. CONCLUSION

We hold that HCR 115 was a valid method of approving the compacts. The compacts, and hence the Legislature's approval of those compacts, do not alter the legal rights or duties of the state or its citizens, nor do they create any state agencies. Therefore, no legislation is required to approve them. Rather, the compacts are simply

---

[10] The mere fact that Indian land is located in a specific county does not give that county jurisdiction over that land, just as Michigan does not have absolute jurisdiction over all tribal lands located within its borders. As already noted, absent express congressional consent, neither the state nor a local unit of government may regulate tribal affairs. Thus, the compacts are not "local acts" because the tribal lands that they regulate are not subject to local jurisdiction as contemplated by Const. 1963, art. 4, § 29.

contracts between two sovereign entities. Without the compacts, the state is prohibited under IGRA from unilaterally regulating tribal gaming in any manner. Further, our Constitution does not limit the Legislature's discretion regarding the proper approval method for tribal-state gaming compacts. Absent a constitutional limitation, the Legislature has discretion to determine the appropriate method for approving a contract. Moreover, we hold that HCR 115 is not a "local act" and so does not violate Const 1963, art 4, § 29. Finally, because no lower courts have had the opportunity to consider the issue of the amendment provision in the compacts since the issue became ripe for review, we remand that issue to the Court of Appeals for consideration. In all other respects, we affirm the decision of the Court of Appeals.

MICHAEL F. CAVANAGH, J.

I concur only with respect to part IV.

MARKMAN, J.

I concur only with respect to part VI.

MARILYN J. KELLY, J. (concurring).

In 1997 and 1998, Governor John Engler negotiated tribal-state gaming compacts with four west Michigan tribes. Under their terms, the compacts would become effective only when all of the following occurred:

> (A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;
>
> (B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature;

(C) Approval by the Secretary of the Interior of the United States; and

(D) Publication in the Federal Register. [Compact with Little Traverse Bands of Odawa Indians, § 11.]

The compacts met all four requirements and became effective on February 18, 1999.

The Legislature approved the compacts by concurrent resolution. The plaintiffs then filed suit asserting that the compacts are legislation. Consequently, they argue, the Michigan Constitution requires that they be approved only by bill. Const. 1963, art. 4, § 22. At issue in this appeal is whether the approval process used by the Michigan Legislature was constitutional.

A majority of Justices, myself included, hold that the tribal-state gaming compacts at issue are not legislation. They are more appropriately viewed as a communication between sovereign entities. The compacts do not impose duties on or restrict the people of the state. Instead, they are contractual in nature, conveying the rights and obligations of the parties, the state, and the various tribes. Therefore, the Legislature's approval by concurrent resolution was appropriate.

We find unpersuasive Justice Markman's reliance on this Court's decision in *Blank*[11] to reach a contrary conclusion. *Blank* is inapplicable to this case. Because the tribal-state gaming compacts are valid, a majority affirms the

---

[11] *Blank v. Dep't of Corrections*, 462 Mich. 103, 611 N.W.2d 530 (2000). The *Blank* plurality adopted the United States Supreme Court's test regarding legislative veto enunciated in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). 462 Mich. at 115, 611 N.W.2d 530.

decision of the Court of Appeals in favor of defendants with the exception of the issue regarding the governor's recent compact amendment. On that issue, a majority agrees to remand the case to the Court of Appeals for consideration of the plaintiffs' argument.

I. Standard of Review

The circuit court ruled for plaintiffs on cross-motions for summary disposition. Decisions on motions for summary disposition are reviewed de novo. *American Federation of State, Co. and Muni. Employees v. Detroit,* 468 Mich. 388, 398, 662 N.W.2d 695 (2003). The question presented is whether the legislative action was constitutional. Similarly, issues of constitutionality are reviewed de novo. *Harvey v. Michigan,* 469 Mich. 1, 6, 664 N.W.2d 767 (2003).

II. The Role of Federal Law

Through the Commerce Clause, the United States Constitution grants the federal government exclusive jurisdiction over relations with Indian tribes. US Const. art. I, § 8, cl 3. The clause gives Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." *Id.* The so-called Indian Commerce Clause places relations with Indian tribes within "the exclusive province of federal law." *Oneida Co. v. Oneida Indian Nation of New York,* 470 U.S. 226, 234, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985). Given the existence of the Indian Commerce Clause, state law generally is not applicable to Indians on tribal reservations unless Congress has specifically made it applicable.

McClanahan v. Arizona State Tax Comm., 411 U.S. 164, 170-171, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).

In recognition of this principle, the United States Supreme Court has held that, if state gambling policy is regulatory rather than prohibitory, then state law is inapplicable to Indian gaming on Indian lands. *California v. Cabazon Band of Indians,* 480 U.S. 202, 209, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). If state law allows gaming but seeks to regulate it, the state is not authorized to enforce that law on Indian reservations. The *Cabazon* Court made clear that regulation of Indian gaming is fundamentally the province of federal law. Tribes retain the exclusive right to regulate gaming on their lands in states where all gaming activity is not prohibited. *Id.* at 207, 107 S.Ct. 1083.

In response to the *Cabazon* decision, Congress passed the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*. With this act, Congress has provided a comprehensive federal regulation of tribal gaming. This framework allows state regulation only to the extent that it is negotiated into the terms of a tribal-state compact. Such a compact must set forth the parameters under which an Indian tribe will establish and operate casino-style gaming facilities. 25 USC 2710(d)(3).

IGRA provides that Indian tribes may engage in class III gaming only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." 25 USC 2710(d)(1)(C). Because it is not classified as class I or class II style gaming, the casino-style gambling at issue in this case involves class III gaming. 25 USC 2703(8).

By allowing the states to play a role through the compacting process, IGRA "extends to the States a power withheld from them by the Constitution." *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 58, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). IGRA does not furnish states with the ability to unilaterally regulate tribal gaming. Rather, it provides them an opportunity to oversee tribal gaming. The role of the state is limited to the terms the state is able to negotiate with a tribe.

IGRA requires a tribe to obtain a compact with a state in order to engage in casino-style gambling. A compact is

> [a]n agreement or contract between persons, nations or states. Commonly applied to working agreements between and among states concerning matters of mutual concern. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. [Black's Law Dictionary (6th ed).]

States cannot prevent tribal gaming by refusing to negotiate or by demanding unreasonable conditions. They must negotiate in good faith upon a request by the tribe for such negotiation. 25 USC 2710(d)(3)(A). While *Seminole* held that Eleventh Amendment immunity protects states from suit by Indian tribes, it did not eliminate a state's duty to negotiate in good faith.

If a state refuses to engage in good-faith negotiations, it can lose its ability to influence the regulation of casino gaming on tribal land. The *Seminole* Court expressly refused to comment on substitute remedies tribes might

seek for a state's failure to negotiate in good faith. *Seminole, supra* at 76 n. 18, 116 S.Ct. 1114.[12]

According to IGRA:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [25 USC 2701(5).]

Michigan allows various forms of gambling. They include horse racing,[13] a state lottery,[14] and voter-approved casino gambling in the city of Detroit.[15] It cannot reasonably be argued that Michigan prohibits, rather than regulates, gambling. Therefore, Michigan's direct power with respect to gambling in Indian country is the bargaining power given to it by the federal government through IGRA.

---

[12] I note that 25 USC 2710(d)(8) does not, as Justice Corrigan suggests, allow the tribe to go directly to the Secretary of Interior who can then approve the compact. The section simply gives the secretary the authority to approve a gaming compact entered into between an Indian tribe and a state. It does not authorize the secretary to approve a compact to which either side has not manifested its assent. After the *Seminole* case, the remedy for a tribe is unclear. Before *Seminole,* it was clear that the remedy was that each side would submit a proposed compact to a mediator, who would choose one of the two. 25 USC 2710(d)(7)(B)(iii). This remedy was available only after issuance of a federal district court order. *Id.* Because *Seminole* affirmed a state's immunity from federal suit, it is unclear if this remedy is still available.

[13] MCL 431.301 *et seq.*

[14] MCL 432.9.

[15] See MCL 432.201 *et seq.*

Relying on *Blank,* Justice Markman argues that the subject of the compacts, state oversight of tribal gaming, can be achieved only through legislation. This misconstrues the state's ability to pass laws applicable to Indians. It is a unique situation. "State law is generally not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress." Cohen's Handbook of Federal Indian Law, § 5.A.

The Michigan Gaming Control and Revenue Act[16] recognized this principle and provided that, in the future, Congress could delegate to the state jurisdiction over Indian gaming on Indian lands. But until or unless that occurs, the only way the parties can authorize Indian gaming is by mutually agreeing to a compact. Were this untrue, the Legislature could simply amend the gaming control act to unilaterally regulate gaming on tribal land.

Plaintiffs argue that 18 USC 1166 gives the state a regulatory role in tribal gaming without the need for a negotiated compact in which the tribe has ceded jurisdiction. Plaintiffs misconstrue 18 USC 1166. This federal statute provides that state laws with respect to gambling apply in Indian country in the same manner in which they apply throughout the rest of the state. 18 USC 1166(a). At 18 USC 1166(d), it provides that

> [t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior . . . has consented to the transfer to the

[16] MCL 432.201 *et seq.*

> State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Section d retains federal jurisdiction over Indian gaming unless a tribe negotiates it away in a compact. Without a compact, a state has no jurisdiction over gaming on Indian land. Hence, 18 USC 1166 does nothing more than adopt state law as the governing federal law for purposes of Indian gaming. *United Keetoowah Band of Cherokee Indians v. Oklahoma,* 927 F.2d 1170, 1177 (C.A.10, 1991). Plaintiffs' arguments to the contrary are misguided.

IGRA allows tribes to engage in some forms of gambling. However, in recognition of the state's interest in the issue, IGRA requires a tribe to have a valid tribal-state gaming compact in place before it can engage in class III gambling. In exchange for giving states this power, IGRA requires the states to negotiate with tribes in good faith. While IGRA provides for the negotiation of tribal-state compacts, it does not specify the manner in which a state must approve a compact. Therefore, one must consult state law to make this determination.

III. The Role of State Law

The Michigan Constitution requires that "All legislation shall be by bill and may originate in either house." Const. 1963, art. 4, § 22. It further provides that, "No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Const. 1963, art. 4, § 26. According to the Legislature's internal rules, concurrent resolutions need be approved only by a majority of those present at the time they are

voted on. See *Mason's Manual of Legislative Procedure*, § 510(1) p. 338.

If only a concurrent resolution is required, the tribal-state gaming compacts were properly approved and are valid. However, if the compacts are legislation, they were not properly approved by the Legislature, because a majority of those elected and serving did not approve them.

While the Michigan Constitution requires that all legislation be passed by bill, it does not define legislation. The dictionary defines "legislation" as "the act of making or enacting laws." *Random House Webster's College Dictionary* (2000). "Law" is defined as "the principles and regulations established by a government or other authority and applicable to a people, whether by legislation or by custom enforced by judicial decision." *Id.*

A similar definition is found in Black's Law Dictionary (6th ed), which describes "legislation" as "[t]he act of giving or enacting laws. . . . Formulation of rule for the future." "Law" is further defined as "[t]hat which must be obeyed and followed by citizens subject to sanctions or legal consequences. . . ." *Id.*

These definitions suggest that legislation involves the Legislature's power to formulate rules applicable to its people. The central characteristic of legislation is the ability of the Legislature to act unilaterally in creating rules applicable to those subject to its power. In *Westervelt*,[17] a plurality of this Court stated, "[T]he concept

---

[17] *Westervelt v. Natural Resources Comm.*, 402 Mich. 412, 440, 263 N.W.2d 564 (1978) (opinion by Williams, J.).

of 'legislation', in its essential sense, is the power to speak on any subject *without any specified limitations."* (Emphasis in original). Where Indian gaming is concerned, the Legislature has no such power. According to IGRA, the Legislature must obtain tribal consent before the tribe will be bound by state law.

The compacts are not legislation. They place no restrictions or duties on the people of the state of Michigan. They create no duty to enforce state laws on tribal lands. Sale of liquor to Indian casinos is subject to the same requirements as sales to other Michigan businesses.

The compacts do not impose duties, responsibilities, and costs on the state. They do not force the state to assume the obligation to oversee and implement the unemployment and worker's compensation statutes. The compacts merely obligate *the tribes* to provide the same benefits to their employees as those employees would be entitled to if they worked for an off-reservation business. A representative provision reads:

> The tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated pursuant to this Compact, such benefits to which the employee would be entitled by virtue of the Michigan Employment Security Act, and the Worker's Disability Compensation Act of 1969, if his or her employment services were provided to an employer engaged in a business enterprise which is subject to, and covered by, the respective Public Acts. [Compact with Little Traverse Band Bands of Odawa Indians, § 5. (internal citations omitted)].

There is no requirement in that representative provision that the tribe fulfill this obligation through state

agencies. It is entirely possible that the tribe has its own system for providing such benefits.

Justice Weaver claims that the tribes have the authority to tax gaming activity under the IGRA. Opinion of Weaver, J., post at 246. We find the claim to be of no consequence in this case. That tribes may have relinquished certain rights as part of the bargaining process has no effect on the proper characterization of the compacts during review of the Legislature's actions.

A higher tax is not placed on Indian gaming proceeds. There is no restriction on advertising related to Indian casinos. The compacts do not give special treatment to Indian casino suppliers. No burden is placed on the people of the state of Michigan through the negotiated compacts.

Plaintiffs argue that the compacts mandate the creation of local revenue sharing boards. However, local governments are not obliged to create these boards unless they wish to take advantage of the monetary contribution the tribes have voluntarily agreed to provide. The compacts essentially assign third-party beneficiary status to local governments. In order to accept the benefits of a compact, a local government must comply with the conditions set out in the compact. The compact, however, does not force a local government either to share in the benefits of the compact or to create a local board.

The compacts essentially advise local governments that, to exercise local control over the payments that the compacts obligate the tribes to disburse to them, they must establish a board. The board must be given the authority to accept the payments. The fact that local governments may exhibit rational self-interest and proceed to set up such boards does not render the compacts

legislation. Nor does the fact that new businesses will be located on reservations near these communities render the subject of the compacts legislative. Any large business that locates a branch near a small community might increase local governmental expenses due to the enhanced economic activity that the branch occasions.

The compacts are applicable only to the tribes. The tribes are generally not subject to the legislative power of the state. To the extent that the compacts delineate rules of conduct applicable to tribal gaming, they do not do it through the use of the Legislature's unrestricted power. They do it through the affirmative choice of the tribes. The compacts are government-to-government agreements. Black's, *supra* at 6. Each explicitly acknowledges that it is between two sovereigns.

Accordingly, the compacts are not legislation. They are more closely analogous to contracts and have been so treated by other states. The Washington Supreme Court has held that "Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts." See *Confederated Tribes of the Chehalis Reservation v. Johnson,* 135 Wash.2d 734, 750, 958 P.2d 260 (1998). See also *Confederated Tribes of Siletz Indians of Oregon v. Oregon,* 143 F.3d 481 (C.A.9, 1998); *Gallegos v. Pueblo of Tesuque,* 132 N.M. 207, 218, 46 P.3d 668 (2002).

As explained previously, the state does not possess the power to apply its law unilaterally to gaming on tribal land. The state and a tribe must negotiate a mutual agreement describing the regulations that may be applied to class III gaming on Indian lands.

The power to legislate is distinct from the power to contract. Whereas, normally, legislation requires only the

agreement of a majority of the lawmakers, a contract must have the agreement of all its parties to all its terms. *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 659, 116 N.W. 628 (1908). The compacts explicitly provide that they do not take effect unless all parties, the state and the tribes, agree to them. The compacts are not a product of the unilateral action or unrestricted power of the Legislature, but, instead, result from negotiations between sovereign entities, the state and the tribes.

Because the compacts are not legislation, the Legislature was not required to approve them by bill. In Michigan, the "legislative authority of the State can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States." *Huron-Clinton Metro. Auth. v. Bds. of Supervisors of Five Cos.*, 300 Mich. 1, 12, 1 N.W.2d 430 (1942), quoting *Attorney General v. Montgomery*, 275 Mich. 504, 538, 267 N.W. 550 (1936).

Nothing in the federal or state constitutions prohibits the Legislature from approving intergovernmental agreements by concurrent resolution. The Legislature's internal rules allow for this form of approval. Negotiated compacts might involve legislation, for example, where they require the state to create a new agency or extend state jurisdictional authority to tribal land. However, the compacts at issue do not involve these concerns.

The Legislature was not restricted in its approval process by IGRA or by the state constitution. Contrary to Justice Markman's position,[18] our state constitution is

[18] Opinion of Markman, J., *post* at 241.

unlike the federal constitution in this respect: whereas the power of the federal government is provided for and limited by the United States Constitution, the power of state government is inherent in the state. This distinction is well-recognized:

> The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found to the exercise of any power which the national government assumes to possess. In this respect, it differs from the constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess. [Cooley, Constitutional Limitations, vol. I, p. 12.]

There is no provision in the state constitution indicating how the Legislature should address an executive agreement negotiated by the Governor and presented to the Legislature for its approval. Because there was no restriction on its ability to act, the Legislature followed its internal procedure, one that it used when approving compacts that the Governor negotiated in 1993. We conclude that, given the unique nature of tribal-state gaming compacts and the content of the particular compacts at issue, this form of legislative approval was appropriate.

IV. Separation of Powers

At the time that plaintiffs filed suit, no amendment of the compacts had been made. For that reason, it is arguable that plaintiffs' separation of powers claim is not ripe for review. If that is the case, plaintiffs' challenge is a facial challenge only.

To establish that an act is facially unconstitutional, the challenging party must show that "no set of circumstances exists under which the [a]ct would be valid." *Straus v. Governor,* 459 Mich. 526, 543, 592 N.W.2d 53 (1999), quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Plaintiffs cannot meet this burden.

The amendment provision of the compacts survives a facial challenge to the Separation of Powers Clause of the Michigan Constitution. Const. 1963, art. 3, § 2. There are many conceivable amendments that a governor might make to these compacts. For example, a governor could amend the provision relating to dispute resolution or the provision about the timing of payments.

Because there was no amendment to challenge at the time plaintiffs brought suit, arguably the issue is not ripe for review. Admittedly, the jurisprudence in this area is unclear. No controlling state precedent exists regarding when a court is to analyze the ripeness issue. Federal secondary authority suggests that a suit must be ripe when it is instituted: "[t]he doctrines of standing and ripeness focus on aspects of justiciability at the time the action is commenced." Moore's Federal Practice, vol 15, § 101.05. In addition:

> The burden is on the plaintiff to allege in the complaint sufficient facts to establish the court's jurisdiction. The court will review the issue for ripeness as of the time the litigation is commenced. The matter must have been ripe for review at that time; subsequent ripening . . . is not sufficient to confer the court with jurisdiction that did not originally exist when the action was initiated." [*Id.* at § 101.74.]

Unfortunately, Moore's offers no authority for this proposition.

Clearly, during the pendency of this litigation, Governor Granholm made amendments to the gaming compacts at issue. It is argued that these render the issue ripe for this Court's review. However, the amendments were made after the opinions from the lower courts were released. This Court has consistently declined to entertain constitutional questions where it lacks the benefit of a fully developed lower court record. *In re CAW,* 469 Mich. 192, 665 N.W.2d 475 (2003); *Jenkins v. Patel,* 471 Mich. 158, 684 N.W.2d 346 (2004).

We may possess jurisdiction to decide the issue. However, the parties addressed the issue only in a cursory fashion, each premising its argument on its characterization of the original compacts as either legislation or contract. Also, the Court of Appeals did not address the issue. Absent a more developed record, in the exercise of judicial restraint, we decline to decide it.

Consistent with our practices, a majority of the Court agrees that the issue of whether the Governor's recent amendments violate the Separation of Powers Clause should be remanded for Court of Appeals consideration.

V. Local Acts Provision

Finally, because the compacts at issue are not legislation, they do not violate the local acts provision of the Michigan Constitution. Const 1963, art 4, § 29. We disagree with Chief Justice Corrigan's local acts analysis. The local acts provision reads:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. [Const 1963, art 4, § 29.]

An act is legislation. Black's Law Dictionary defines a legislative act as: "[a]n alternative name for statutory law. A bill which has been enacted by the legislature into law." Black's Law Dictionary (6th ed). Since tribal-state gaming compacts are not legislation, as discussed *supra,* the local acts provision of our Constitution is not applicable to them.

V. A response to the dissents

We are unpersuaded by Justice Markman's argument which has as its premise that *Blank* is applicable to the facts of this case. *Blank* involved a case where the Legislature delegated power to an administrative agency but attempted to retain a legislative veto. 462 Mich. at 113, 611 N.W.2d 530. In contrast, the present case involves two separate branches of government approving agreements with sovereign Indian tribes. The question presented is whether the Legislature's ratification of the agreements by concurrent resolution was the appropriate manner in which to manifest its assent.

The extra-jurisdictional cases that the dissents rely on are distinguishable from the present case. In each, the governor of the state acted unilaterally to bind the state to the compact. While those cases hold that legislative approval is required, no case suggests the form that such approval must take. See *State of Kansas ex rel Stephan v. Finney,* 251 Kan. 559, 836 P.2d 1169 (1992); *Narragansett Indian Tribe of Rhode Island v. Rhode Island,* 667 A.2d

280 (1995). In the present case, the Michigan Legislature expressed its approval of the compacts. The unique question before us is whether that Legislature's approval was sufficient under the Michigan Constitution. We hold that it was.

Both Justice Markman and Justice Weaver rely on *Becker v. Detroit Savings Bank,* 269 Mich. 432, 257 N.W. 853 (1934). *Becker* is inapplicable to this case. It dealt with a legislative resolution that purported to convey to the courts the Legislature's intent in passing a certain law. The Court held that, while the resolution was entitled to "respectful consideration," it was not the law. *Id.* at 436, 257 N.W. 853. *Becker* concluded that the courts are bound to apply the law as written. *Id.*

The question here is not whether the compacts must be followed in light of conflicting statutory authority. It is whether the Legislature was required to voice its approval in the form of a bill that is passed into law. *Becker* notes that "[j]oint resolutions * * * are often used to express the legislative will in cases not requiring a general law." *Id.* at 435, 257 N.W. 853, quoting *Hoyt v. Sprague,* 103 U.S. 613, 636, 26 L.Ed. 585 (1880). *Becker* does not aid in determining whether the compacts at issue require a general law.

VI. Conclusion

A majority of Justices, myself included, hold that the tribal-state gaming compacts at issue are not legislation. They are appropriately viewed as agreements between sovereign entities. They do not impose duties on or restrict the people of the state. Instead, they are contractual in nature, conveying the rights and obligations of the parties, the state, and the various tribes. Therefore, a concurrent

resolution of the Legislature was appropriate to validate them.

For these reasons, a majority affirms the Court of Appeals decision in favor of defendants, except as to the recent amendments made by Governor Granholm. On that issue, a majority agrees to remand the case to the Court of Appeals for consideration of plaintiffs' separation of powers claim.

WEAVER, J. (concurring in part and dissenting in part).

I concur with the majority's holding that the compacts do not violate Const 1963, art 4, § 29, the "local acts" clause.[19] But I dissent from the majority's decision that the tribal-state gaming compacts at issue, entered into and signed by various Indian tribes and Governor Engler on behalf of the state pursuant to the federal Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq.*, were validly approved by a joint resolution of the Legislature. Accordingly, I would hold that the compacts are void because they are legislation that is required to be enacted by bill, not passed by issuing a joint resolution, and I therefore would reverse the Court of Appeals decision on this issue.

I would also hold that the power to bind the state to a compact with an Indian tribe is an exercise of the legislative power, and that the Governor does not have the authority to bind the state to such a compact. Art. 4, § 22 of the Michigan Constitution requires that "[a]ll legislation

[19] The majority correctly holds that the "local act" provision of Michigan's constitution, art 4, § 29, is not implicated by the compacts; I concur in the majority's decision to affirm the decision of the Court of Appeals on this issue.

shall be by bill. . . ." A resolution is not a constitutional method of expressing the legislative will where that expression is to have the force of law and bind people other than the members of the house or houses adopting it. *Becker v. Detroit Savings Bank,* 269 Mich. 432, 434-435, 257 N.W. 853 (1934). The tribal-state compacts have the force of law and bind people other than the legislative members who adopted them. Therefore, the Legislature must exercise its power to bind the state to a compact with an Indian tribe by enacting a bill, not by passing a joint resolution. I would reverse the Court of Appeals on this issue and hold that the compacts at issue are void.

Because I would hold that the compacts are void, it is unnecessary to remand to the trial court for consideration of whether the provision in the compacts that permits the Governor to amend the compacts without legislative approval violates Const. 1963, art. 3, § 2, the separation of powers doctrine. Such an issue is moot in light of my conclusion that the compacts are void.

I

The compacts at issue were signed by Governor Engler and the various Indian tribes, and approved by the Legislature pursuant to a joint resolution.[20] Appellants argue that the Legislature's approval by joint resolution was not valid. Appellants assert that the policy determinations in deciding whether and how to allow Indian tribes

[20] See House Concurrent Resolution (HCR) 115 (1998). While a bill must be passed by a majority of elected and serving members of the Legislature, a resolution may be passed by a majority vote of those legislators present at the time, as long as a quorum is present.

to operate casinos in Michigan are legislative in nature, and therefore the compacts must be approved by bill, not joint resolution, because the Michigan Constitution, art. 4, § 22 requires that "[a]ll legislation shall be by bill."

Underlying the issue of whether the compacts were validly approved is a more fundamental question: who, under Michigan law, has the authority to bind the state of Michigan to a compact negotiated under IGRA. If the authority is vested in Michigan's Governor, the Governor's approval alone would be sufficient to render the compacts valid, there would be no requirement that the Legislature approve the compacts at all, and the manner in which the Legislature approved the compact would not be governed by the Constitution. See *Panzer v. Doyle,* 271 Wis.2d 295, 337, 680 N.W.2d 666 (2004). But if the authority to approve a compact is vested in Michigan's Legislature, then it is necessary to determine whether approval by resolution was a valid exercise of the Legislature's power under Michigan's Constitution.

II

IGRA does not specify which branch of a state government should bind the state to a compact with Indian tribes.[21] Rather, the determination whether a state has validly bound itself to a compact is a matter of state sovereignty and left to state law. *Saratoga Co. Chamber of*

[21] The IGRA provides, in pertinent part: "Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 USC 2710(d)(3)(A).

Commerce Inc. v. Pataki, 100 N.Y.2d 801, 822, 766 N.Y.S.2d 654, 798 N.E.2d 1047 (2003). For the reasons set forth below, I would hold that it is the Legislature that has the authority to bind the state to a compact under IGRA and that the Governor does not have the authority to bind Michigan to a compact under IGRA.

Michigan's Constitution separates the powers of government: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const. 1963, art. 3, § 2. The executive power is vested in the Governor, Const 1963, art 5, § 1, and the legislative power is vested in a senate and a house of representatives. Const. 1963, art. 4 § 1. The executive power is, first and foremost, the power to enforce the laws or to put the laws enacted by the Legislature into effect. *The People ex rel Sutherland v. Governor,* 29 Mich. 320, 324-325 (1874), *People ex rel Attorney General v. Holschuh,* 235 Mich. 272, 274-275, 209 N.W. 158 (1926); 16A Am Jur 2d, Constitutional Law § 258, p. 165 and § 275, p. 193. The legislative power is the power to determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal laws. *Id.* The Governor has no power to make laws. *People v. Dettenthaler,* 118 Mich. 595, 77 N.W. 450 (1898). "[T]he executive branch may only apply the policy so fixed and determined [by the legislative branch], and may not itself determine matters of public policy or change the policy laid down by the legislature. 16 C.J.S. Constitutional Law § 216, p. 686.

As explained below, I conclude that binding the state to a compact with an Indian tribe involves determinations

of public policy and the exercise of powers that are within the exclusive purview of the Legislature.

IGRA itself contemplates that states will confront several policy choices when negotiating tribal gaming compacts. *Saratoga Co Chamber of Commerce Inc. v. Pataki, supra* at 822, 766 N.Y.S.2d 654, 798 N.E.2d 1047. Under IGRA, a compact may include provisions relating to: (i) the application of directly related criminal and civil laws and regulations of the Tribe or the State; (ii) the allocation of jurisdiction between the State and the Tribe to permit enforcement of such laws; (iii) State assessments to defray the costs of regulating gaming; (iv) taxation by the Tribe of such activity; (v) remedies for breach of contract; (vi) standards of operation for gaming and maintenance of gaming facilities; and (vii) "any other subjects that are directly related to the operation of gaming activities." 25 USC 2710(d)(3)(C)(i)-(vii).

The Little River Band compact contains examples of policy decisions made for each of the seven issues recognized in 25 USC 2710(d)(3)(C)(i-vii). (i) Tribal law and regulations, not state law, are applied to regulate gambling.[22] But the compact applies state law, as amended, to the sale and regulation of alcoholic beverages encompassing certain areas. (section 10[a], p. 13).(ii) The tribe, not the state, is given responsibility to administer and enforce

[22] The compact states, "Any limitations on the number of games operated or played, their location within eligible Indian lands as defined under this Compact, hour or period of operation, limits on wages or potsize, or other limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the tribe pursuant to this compact." (section 3[a][8], p. 5 of the Little River Band compact).

the regulatory requirements. (section 4[m][1], p. 9). (iii) To allow state assessments to defray the costs of regulating gaming, the compact states that the tribe shall reimburse the state for the costs up to $50,000 it incurs in carrying out functions that are authorized within the compact. (section 4[m][5], p. 10). Also, the compact states that the tribe must pay 2% of the net win at each casino derived from certain games to the county treasurer.[23] (section 18(a)(i), p. 18).(iv) Under IGRA the tribe could tax the gaming activity, but the compact does not allow such taxation. (v) The compact provides for dispute resolution procedures in the event there is a breach of contract. (p. 11).(vi) The compact includes standards for whom a tribe can license and hire in connection with gaming, (section 4[d], p. 6), sets accounting standards the gaming operation must follow, (p. 7), and stipulates that gaming equipment purchased by the tribe must meet the technical standards of the state of Nevada or the state of New Jersey. (section 6[a], p. 11).(vii) The compact addresses the "other subjects that are directly related to the operation of gaming facilities" throughout the document. For example, it allows for additional class III games to be conducted through the agreement of tribe and the state. (section 3[b], p. 5). Also, the compact states that the tribe must purchase the spirits it sells at the gaming establishments from the Michigan Liquor Control Commission and that it must purchase

[23] The compact states that it is the "States intent, in this and its other compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the class III gaming facility." (section 18[a][ii], p. 18).

beer and wine from distributors licensed by the Michigan Liquor Control Commission. (section 10[b], p. 13).

These compact provisions necessarily require fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation, criminal and civil jurisdiction, and standards of operation and maintenance require a balancing of differing interests, a task the multimember, representative Legislature is entrusted to perform under the constitutional separation of powers. See *Saratoga Co. Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 822-823, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (2003).

To date, every other state supreme court that has addressed whether the governor or the legislature of a state has the authority to bind the state to a compact with an Indian tribe under IGRA has concluded that the state's governor lacks the power unilaterally to bind the state to tribal gaming compacts under IGRA. See *State ex rel Stephan v. Finney,* 251 Kan. 559, 836 P.2d 1169 (1992); *State ex rel Clark v. Johnson,* 120 N.M. 562, 904 P.2d 11 (1995); *Narragansett Indian Tribe of Rhode Island v. Rhode Island,* 667 A.2d 280 (1995); *Pataki, supra; Panzer, supra.*[24] These cases concluded that entering into a tribal-state compact under IGRA, and thereby committing the state to a particular position with respect to Indian gaming, involves subtle and important decisions regarding

[24] A federal district court held that the governor of Mississippi did have the authority to bind the state to a compact with the Indian tribes, based on a Mississippi statute which authorizes the governor to transact business with other sovereigns, such as other states, territories, or the United States Government. *Willis v. Fordice,* 850 F.Supp. 523 (1994). Unlike Mississippi, Michigan has no statutory or constitutional provision giving the Governor authority to bind the state in a compact with an Indian tribe.

state policy that are at the heart of legislative power. *Panzer, supra* at 338, 680 N.W.2d 666. Further, the cases have relied on the fact that their state constitutions, like Michigan's, provide for separation of powers, vesting the legislative power in the legislature and vesting the executive power in the governor. *Finney, supra at* 577, 836 P.2d 1169; *Clark, supra* at 573, 904 P.2d 11; *Narragansett Indian Tribe, supra* at 280; *Pataki, supra* at 821-822, 766 N.Y.S.2d 654, 798 N.E.2d 1047; *Panzer, supra* at 338, 680 N.W.2d 666. The cases recognized that the legislature creates the law, that the governor executes the laws, and that a compact with an Indian tribe did not execute existing law, but was, instead, an attempt to create new law. *Finney, supra* at 573, and *Clark, supra at* 573, 904 P.2d 11. The courts also focused on the balance that the compact struck on matters of policy such as the regulation of class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the state and the tribe necessary for the enforcement of state or tribal laws or regulations. *Clark, supra* at 574, 904 p.2D 11; *Pataki, supra* at 822, 766 N.Y.S.2d 654, 798 N.E.2d 1047; *Panzer, supra* at 339, 680 N.W.2d 666.

The approval of a compact with an Indian tribe involves numerous policy decisions. The executive branch does not have the power to make those determinations of public interest and policy, but may only apply the policy as fixed and determined by the legislature. I would agree with the other state courts that have examined this issue, and hold that committing the state to the myriad policy choices inherent in negotiating a gaming compact constitutes a legislative function. Thus, the Governor does not have the authority to bind the state to a compact with an Indian tribe; only the Legislature does.

III

Having determined that binding the state to a compact is a legislative function, the question then becomes whether the Legislature may do so by a joint resolution. I would conclude that it may not because under the Michigan Constitution a resolution is not a valid exercise of the legislative power.

The Michigan Constitution requires that "[a]ll legislation shall be by bill. . . ." Const 1963, art 4, § 22. This Court has previously recognized that "[a] mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." *Becker v. Detroit Savings Bank,* 269 Mich. 432, 434-435, 257 N.W. 853 (1934).

In the 1997-1998 term there were 117 concurrent resolutions introduced in the House of Representatives. Approximately 23 concurrent resolutions were adopted, including HCR 115, which approved the compacts at issue. The other 22 concurrent resolutions adopted included resolutions commemorating the 150th anniversary of the selection of the city of Lansing as the permanent capital of the state of Michigan [HCR 24]; urging the President of the United States to designate the Detroit River as an American Heritage River [HCR 69]; prescribing the legislative schedule [HCR 74 & HCR 113]; and renaming the Michigan Civilian Conservation Corps' Camp Vanderbild in the honor of State Representative Tom Mathieu [HCR 117].

A joint resolution is not an act of legislation, and it cannot be effective for any purpose for which an exercise of legislative power is necessary. *Cleveland Terminal &*

Valley RR Co v. State, 85 Ohio St. 251, 293, 97 N.E. 967, 973 (1912). In issuing the joint resolution approving of the compacts in the instant case, the Legislature purported to bind the entire state to the policy decisions of and the terms set forth in the compacts, which would be in place for at least twenty years. This was not a valid exercise of the legislative power, because art. 4, § 22 requires that legislation be by bill.

Conclusion

I would hold that the power to bind the state to a compact with an Indian tribe is an exercise of the legislative power, and that that the Legislature must exercise its power to bind the state by enacting a bill, not by passing a joint resolution. Accordingly, I would conclude that the compacts are void, and I would reverse the decision of the Court of Appeals on that issue. Because I would hold that the compacts are void, it is unnecessary to address whether the provision that permits the Governor to amend the compacts is unconstitutional.

MARKMAN, J. (concurring in part and dissenting in part).

I respectfully dissent from the lead opinion, except as to part VI thereof, in this declaratory action in which we granted leave to appeal to consider: (1) whether the tribal-state gaming compacts at issue, entered into and signed by various Indian tribes and Governor Engler on behalf of the state pursuant to the federal Indian Gaming Regulatory Act, 25 USC 2701 *et seq.,* constitute "legislation" such that Michigan's Legislature violated Const. 1963, art. 4, § 22 when it approved them by resolution rather than by bill; (2) whether the provision in the compacts that purports to

empower the Governor to amend them without legislative approval violates Const 1963, art 3, § 2, the separation of powers doctrine; and (3) whether the compacts violate Const. 1963, art. 4, § 29, the "local acts" clause.

Regarding the first issue, the circuit court concluded that the compacts constitute legislation and, therefore, the Legislature was required to adopt them by bill. The Court of Appeals disagreed and reversed the decision of the circuit court. In my judgment, the compacts constitute legislation and, therefore, the Legislature violated art. 4, § 22 when it adopted them by a resolution vote. Accordingly, I dissent from the lead opinion, and I would reverse the decision of the Court of Appeals on this issue and reinstate the decision of the circuit court.

Regarding the second issue, the circuit court concluded that the compacts violate art. 3, § 2. The Court of Appeals reversed the decision of the circuit court on the basis that this issue was not ripe for review because the Governor had not yet attempted to amend the compacts. However, Governor Granholm recently sought to amend one of the four compacts and, therefore, in my judgment, this issue is ripe. I conclude that the amendatory provision violates art. 3, § 2 and, therefore, I dissent from the lead opinion on this issue.

Regarding the third issue, the circuit court concluded that art. 4, § 29 is not implicated. The Court of Appeals agreed and affirmed the decision of the circuit court. I concur with the analysis set forth in part VI of the lead opinion finding that art. 4, § 29 is not implicated and, accordingly, I would affirm the decisions of the lower courts on this issue.

I. BACKGROUND

In *California v. Cabazon,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), the United States Supreme Court considered whether California could legally enforce its regulatory gambling laws on Indian reservations if the state did not completely prohibit such gambling.[25] While the Court affirmed that it "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' . . . and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,'" it also acknowledged that "[i]t is clear . . . that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Id.* at 207, 107 S.Ct. 1083.[26] Thus, the question to resolve in *Cabazon* was whether the Congress had expressly provided that state laws that regulate, but do not prohibit, gambling may be applied on Indian reservations. The Court answered that question in the negative and, accordingly, held that California had no legal right to enforce those laws on reservations.

In response to *Cabazon,* the Congress, in 1988, passed the Indian Gaming Regulatory Act, 25 USC 2701 *et seq.* (IGRA). The United States District Court for the District

---

[25] If the state *prohibited* class III gaming within its borders, *Cabazon* held that California could enforce its criminal laws relating to that prohibition on Indian lands through 18 USC 1162.

[26] Additionally, the Court in *Cabazon* held that "[under] . . . exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members" even absent express Congressional consent. *Cabazon, supra* at 215, 107 S.Ct. 1083. However, the Court resolved that tribal gambling was not an area encompassing such "exceptional circumstances" so as to "escape the preemptive force of federal and tribal interests. . . ." *Id.* at 221, 107 S.Ct. 1083.

of South Dakota in *Cheyenne River Sioux Tribe v. South Dakota,* 830 F.Supp. 523, 526 (D.S.D., 1993), aff'd 3 F.3d 273 (C.A.8, 1993), stated:

> The IGRA was enacted in response to the Supreme Court's decision in *Cabazon.* Congress wished to give states a certain amount of input into gambling on Indian reservations. S.Rep. No. 446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071.
>
> The IGRA gives states the right to get involved in negotiating a gaming compact because of the obvious state interest in gaming casino operations within the state boundaries. . . .[27]

IGRA divides gaming activities into three classes. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 USC 2703(6). Class II gaming includes bingo and card games – other than banking card games – that are played in conformance

---

[27] See also *United States v. Santa Ynez Band of Chumash Mission Indians,* 983 F.Supp. 1317, 1323 (C.D.Cal., 1997) ("In [*Cabazon*], the Supreme Court sharply limited the power of states to apply their gambling laws to Indian gaming. An essential element of its decision was that Congress had not acted specifically to make state gambling laws applicable in Indian country. This decision made clear that it would require a new act of Congress for states to have any effective ability to prevent or regulate Indian gaming. IGRA was enacted in direct response to *Cabazon* . . . . Subsection (a) of § 1166 expressly makes state gambling laws applicable in Indian country. . . .") See also *Confederated Tribes of Siletz Indians of Oregon v. United States,* 110 F.3d 688, 692 (C.A.9, 1997); *Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546, 1548 n. 3 (C.A.10, 1997); *Cheyenne River Sioux Tribe v. South Dakota,* 830 F.Supp. 523, 525-526 (D.S.D., 1993), aff'd 3 F.3d 273 (C.A.8, 1993).

with state laws and regulations regarding hours of operation and limitations on wagers or pot sizes. 25 USC 2703(7). Class III gaming includes all other forms of gambling. 25 USC 2703(8).

At issue in this case is class III gaming, referred to throughout the remainder of this opinion as "gambling" or "casino gambling." 18 USC 1166 provides a starting point to IGRA as it relates to gambling. It states:

> (a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
>
> (c) For the purpose of this section, the term "gambling" does not include –
>
> (1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
>
> (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under

> [25 USC 2710(d)(8)] of the Indian Gaming Regulatory Act that is in effect.
>
> (d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country. . . .

Thus, IGRA generally provides that in the absence of a tribal-state compact, for purposes of federal law, all state gambling laws, including regulatory, as well as prohibitory, laws and regulations and any relevant criminal punishments, apply on Indian land just as they apply elsewhere in the state, albeit with the proviso that criminal prosecutions are within the jurisdiction of the federal government.[28]

---

[28] It appears that states have some enforcement powers under § 1166(a) – civil enforcement powers. See *Santa Ynez Band, supra* at 1322:

> Consideration of the structure of § 1166 suggests strongly that Congress intended to distinguish civil enforcement to prevent future acts of non-conforming gaming from criminal enforcement efforts to punish past acts. As to the latter, § 1166(b) and (d) leave no doubt that criminal enforcement is the exclusive province of the United States. The United States contends that Congress also intended for it to have the same exclusive power to bring civil enforcement actions under § 1166(a). The statute says nothing at all to suggest this. On the contrary, the more natural inference to be drawn from Congress' decision to make state law applicable, as such, in § 1166(a), rather than to convert it to federal law as in § 1166(b), is that Congress intended to divide the enforcement of the two subsections between the states and the United States.
>
> If Congress had not intended § 1166(a) to be used by the states for civil enforcement of the state laws made applicable by it, there was no need first to make all state gambling laws applicable, as such, and then to carve out only those acts which would be punishable under state law and redefine them as identical, independent federal offenses [under § 1166(b)].

If a tribe wishes to "opt-out" of the default federal law rule of § 1166 and to lawfully engage in casino gambling on its Indian land, it may do so in accordance with 25 USC 2710(d) of IGRA. That section provides, in relevant parts:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> * * *
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.
>
> * * *
>
> (3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.[29]

---

[29] In 1996, the United States Supreme Court somewhat limited the reach of IGRA in *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). In *Seminole Tribe,* the Court considered 25 USC 2710(d)(7) of IGRA, a provision that permits Indian tribes to sue a state in federal court when that state has refused to negotiate in good faith for a tribal-state compact. The Court ruled that this provision violates state sovereign immunity as preserved by the Eleventh Amendment of the United States Constitution and is therefore unconstitutional.

* * *

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

* * *

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any tribal-state compact entered into by the Indian tribe under paragraph (3) that is in effect.

Thus, under § 2710(d), a state and a tribe are encouraged to negotiate with one another with the ultimate goal of entering into a mutually agreeable tribal-state compact that makes gambling on that tribe's lands lawful and that may alter the general gambling laws and regulations and enforcement procedures that otherwise apply to that tribe through § 1166.

In essence, by providing under § 1166 that, in the absence of a compact, state gambling laws and regulations apply on Indian land, the Congress provided the consent to the states that was found lacking in *Cabazon* to regulate tribal gambling in the same manner and to the same extent that states regulate gambling elsewhere within their borders.[30] However, to maintain the proper balance between Indian and state affairs, the Congress further provided under § 1166 that the federal government is charged with enforcing state criminal gambling laws and regulations on Indian land.

---

[30] For example, if state law provides that casino gambling anywhere in the state is prohibited and punishment for illegal casino gambling is imprisonment of five years and a fine of $10,000, that is the law that applies to tribal lands under § 1166 in the absence of a compact. If the state decides at some later point, perhaps because of a large illegal gambling problem specifically on tribal lands, to amend its laws to hold that gambling is still entirely prohibited, but that the punishment is now imprisonment of twenty-five years and a $200,000 fine, *that* amended law becomes the law that is applicable to tribal lands under § 1166 in the absence of a compact. Thus, by making state gambling laws – whatever those laws are at a given time – applicable to Indian land in the absence of a compact, IGRA gives states meaningful regulatory authority over casino gambling on Indian land. Therefore, Chief Justice Corrigan is incorrect when she states that "states have no authority to regulate tribal gaming under IGRA unless the tribe explicitly consents to the regulation in a compact." *Ante* at 227.

This point was succinctly made by the United States Court of Appeals for the Ninth Circuit in *Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 721-722 (C.A.9, 2003). There, the court addressed the role of IGRA and, of particular relevance, 18 USC 1166, insofar as that provision grants states the power to generally regulate gambling on Indian land. The court stated:

> IGRA changed the landscape.... [I]t devised a method to give back some of the *regulatory* [italics in original] authority that the Supreme Court had held inapplicable to Indian lands in *Cabazon.* One of the bases of the holding in *Cabazon* was that Congress had not explicitly ceded regulatory authority for gaming to the states in Public Law No. 280 or otherwise. IGRA responded by creating a statutory basis for gaming regulation that introduced the compacting process as a means of sharing with the states the federal government's regulatory authority over class III gaming. Simultaneously, IGRA put into effect 18 USC 1166, which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 USC 1166(a). The federal government retained the power to prosecute violations of state gambling laws in Indian country, so as to preserve the delicate balance of power between the States and the tribes. *However, the fact that the federal government retained that power does not change the fact that California may enact laws and regulations concerning gambling that have an effect*

on Indian lands via § 1166. [*Artichoke Joe's, supra* at 721-722 (citations omitted; emphasis added).][31]

Moreover, through § 2710(d), the Congress provided the states with a direct means of "escap[ing] the preemptive force of federal and tribal interests"[32] regarding class III gaming on Indian land by granting states the power to *specifically* make lawful and regulate casino gambling on particular Indian land, as long as such actions arise from the negotiation process and are otherwise in accordance with IGRA.

In 1993, Governor Engler, pursuant to § 2710(d) of IGRA, entered into tribal-state compacts with seven Michigan tribes that were already conducting class III gambling before the Congress's passage of IGRA.[33] As required by the terms of a consent judgment that resolved a federal lawsuit filed by the tribes against the Governor to compel negotiations, the compacts were approved by the

---

[31] See also *Sycuan Band of Mission Indians v. Roache,* 788 F.Supp. 1498, 1506 (S.D.Cal., 1992), aff'd 54 F.3d 535 (C.A.9, 1994) ("The balance struck by Congress under the IGRA appears to be that the state laws governing gaming apply, for the most part, with the same force and effect the laws would have elsewhere in the state. Thus, by federalizing state law, the states could generally define the boundary between legal and illegal gaming, and could be assured that activities that would be illegal if performed outside the reservation boundaries would also be illegal within the reservation boundaries.")

[32] *Cabazon, supra* at 221, 107 S.Ct. 1083.

[33] These tribes were the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Keweenaw Bay Indian Community, the Hannahville Indian Community, the Bay Mills Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Saginaw Chippewa Indian Tribe. All these tribes are currently operating casinos.

Legislature by resolution and became effective.[34] Additional state court litigation followed in which the Michigan Court of Appeals twice confirmed that the Governor did not violate the separation of powers clause by binding the state to tribal-state compacts where the Legislature had approved those compacts by resolution. Thus, the Court of Appeals implied that mere resolution approval by the Legislature of tribal-state compacts was proper. See *McCartney v. Attorney General,* 231 Mich.App. 722, 728,

---

[34] After IGRA was passed, the tribes that were already engaged in casino gambling in Michigan requested that the Governor negotiate gaming compacts. The negotiations stalled and the tribes filed suit in federal court to compel negotiations. See *Sault Ste Marie Tribe v. Engler,* 93 F Supp 2d 850 (W.D.Mich., 2000). During this litigation, the parties reached a settlement and the Court entered a consent judgment. Essentially, the consent judgment is constituted of the seven 1993 compacts entered into by Governor Engler and the tribes in accord with the settlement. This consent judgment should not be interpreted as a federal court determination that a resolution vote is a proper adoption because the court did not address this question; it merely incorporated into the consent judgment the terms of the settlement as agreed to by Governor Engler and the tribes. Moreover, the United States Court of Appeals for the Sixth Circuit, in *Keweenaw Bay Indian Community v. United States,* 136 F.3d 469, 477 (1998), in which the court addressed an issue pertaining to one of the 1993 consent judgment compacts (but not the issue implicated in this case), stated:

> Regarding obtaining the Michigan Governor's "approval" twice, we point out that a governor's endorsement of a compact as required by the terms of a compact is coincidental, varied and dependent on the relevant state laws. *See, e.g.,* [*Pueblo of Santa Ana v. Kelly,* 104 F.3d 1546 (C.A.10, 1997)], cert den 522 U.S. 807, [118 S Ct 45, 139 L.Ed.2d 11] (1997) (deciding that Governor of New Mexico lacked authority, under New Mexico Constitution or state statute, to bind state to tribal-state compacts).
>
> Thus, the Sixth Circuit expressly recognized that a governor might not have the power to bind the state to an IGRA compact and that the question is a matter of state law.

587 N.W.2d 824 (1998); *Tiger Stadium Fan Club v. Governor,* 217 Mich.App. 439, 553 N.W.2d 7 (1996).

The compacts at issue in this case were first signed by Governor Engler and each of four different Indian tribes in January of 1997.[35] Each compact was to take effect, according to a compact provision, after "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature."[36] The compacts were modified and re-executed in December 1998, and the Legislature proceeded to consider them by resolution. See HCR 115 (1998). Unlike a bill, which must be passed by a majority of elected and serving members of the Legislature, a resolution may be passed by a majority vote of those legislators present at the time, as long as a quorum is present. The House of Representatives approved the compacts by a resolution vote of 48 to 47, and the Senate followed suit by a resolution vote of 21 to 17.

Following is a list of the essential compact terms:

- The compacts permit a variety of gambling activities.

- The compacts provide that the tribe and the Governor may subsequently agree to expand the list of class III gaming activities permitted by the compacts.

- The compacts provide that the tribe shall "enact a comprehensive gaming regulatory ordinance" but if

---

[35] These tribes are the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi. Of these tribes, the Little Traverse Bay Band and the Little River Band are currently operating casinos.

[36] See § 11 of the compacts.

any regulation imposed by the tribe is less stringent than that imposed by the compact, the compact governs.

- The compacts provide that the tribe shall have responsibility to administer and enforce applicable regulatory requirements.

- The compacts provide limitations on the tribe's hiring practices, for example, the tribe may hire no one under age 18 (whereas non-Indian casinos in Michigan may employ only those who are 21 or older).

- The compacts allow persons aged 18 and over to gamble (whereas the age requirement in the rest of Michigan is 21).

- The compacts incorporate the protections of the Michigan Employment Security Act, MCL 421.1 *et seq.*; and the Worker's Disability Compensation Act of 1969, MCL 418.101 *et seq.*

- Any disputes between the tribe and the state are to be resolved through binding arbitration.

- The tribe must post a sign in the gaming facility noting that the facility "is not regulated by the State of Michigan."

- The compact is binding for a period of twenty years after it becomes effective.

- The tribe must make semi-annual payments of 8% of the net win at the casino to the Michigan Strategic Fund.

- The tribe must make semi-annual payments of 2% of the net win to the treasurer of the relevant county to be held by the treasurer on behalf of the Local Revenue Sharing Board. To this end, counties in the

vicinity of the class III gaming facilities shall create a Local Revenue Sharing Board.

- The compacts contain a provision that purports to empower the Governor to amend them without legislative approval.

Various lawsuits were filed questioning the validity of the 1998 compacts. The Sault Ste. Marie Tribe of Lake Superior sued in federal court to enjoin the operation of the new casinos, but the United States Court of Appeals for the Sixth Circuit dismissed this suit on standing grounds. *Sault Ste. Marie Tribe v. United States,* 288 F.3d 910 (C.A.6, 2002). Two state legislators also challenged the approval of Michigan's 1998 compacts by the Secretary of Interior, which suit was also dismissed on standing grounds by the United States Court of Appeals for the Sixth Circuit. *Baird v. Norton,* 266 F.3d 408 (C.A.6, 2001).

Plaintiffs-appellants, the Taxpayers of Michigan Against Casinos and Laura Baird, filed this suit against Michigan in the Ingham Circuit Court seeking a declaratory judgment that the compacts do not comport with various constitutional provisions. Plaintiffs contend first that the compacts amount to legislation and, therefore, pursuant to Const. 1963, art. 4, § 22 the Legislature was required to adopt them by bill rather than approve them by resolution. The circuit court held that the compacts should have been approved by bill. The Court of Appeals reversed the circuit court decision, concluding that the compacts do not constitute legislation because they contain no enforcement provision that would ensure that their terms are satisfied and because the power of the state to legislate in this area is preempted by federal law. The Court of Appeals opined that the compacts constitute mere contracts and, therefore, approval by resolution was not

constitutionally infirm. Plaintiffs also contend that the provision in the compacts that purports to empower the Governor to amend them without legislative approval violates Const. 1963, art. 3, § 2, the "separation of powers" doctrine. The circuit court agreed with plaintiffs. The Court of Appeals, however, reversed the decision of the circuit court on the basis that the amendatory provision issue was not ripe for review because the Governor had not yet attempted to amend the compacts. Plaintiffs additionally contend that the compacts violate Const. 1963, art. 4, § 29, the "local acts" clause. The circuit court disagreed, holding that art. 4, § 29 is not implicated. The Court of Appeals agreed and affirmed the circuit court on this issue.

II. STANDARD OF REVIEW

Matters of constitutional and statutory interpretation are reviewed de novo by this Court. *Harvey v. Michigan*, 469 Mich. 1, 6, 664 N.W.2d 767 (2003); *Roberts v. Mecosta Co. Gen. Hosp.*, 466 Mich. 57, 62, 642 N.W.2d 663 (2002).

III. ANALYSIS

This Court has been called upon to consider, in this action seeking declaratory judgment, matters of significant constitutional concern. We are asked to consider whether the challenged tribal-state compacts and various actions undertaken by our legislative and executive branches of government pertinent to those compacts are consistent with the enactment requirement, the separation of powers doctrine, and the local acts provision embodied in Michigan's Constitution. "[D]eciding whether a matter has in any measure been committed by the Constitution to

another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." House *Speaker v. Governor,* 443 Mich. 560, 575, 506 N.W.2d 190 (1993).

A. DO COMPACTS CONSTITUTE "LEGISLATION"?

The first question presented on review requires that we consider whether the tribal-state compacts at issue constitute "legislation." The Michigan Constitution requires that "[a]ll legislation shall be by bill. . . ." Const. 1963, art. 4, § 22. In addition, "[n]o bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Const. 1963, art. 4, § 26. Plaintiffs contend that the compacts constitute legislation and, therefore, the Legislature was required to approve them by bill-by a majority vote of the members elected to and serving in each house. Defendants contend that the compacts do not constitute legislation and instead are contracts of a unique nature that the state may validly enter into pursuant to federal law as provided in IGRA and, therefore, the compacts are not subject to Const. 1963, art. 4, §§ 22 and 26.

Black's Law Dictionary (7th ed) defines "legislation" as "[t]he process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process-Also termed *lawmaking*. . . ." Michigan's Constitution provides that "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Const. 1963, art. 4, § 1. Thus, the branch of government

"constituted to perform [the lawmaking] process" is the Legislature, and the "formal procedure" by which this process is to occur is constitutionally defined – lawmaking is to be "by bill" and is subject to a majority vote of those elected to each house of the Legislature. Const. 1963, art. 4, §§ 22 and 26. Accordingly, the definition of "legislation" in Black's Law Dictionary requires that we consider whether the compacts amount to "positive lawmaking."

In *Blank v. Dep't of Corrections,* 462 Mich. 103, 611 N.W.2d 530 (2000), this Court considered whether a provision in the Administrative Procedures Act, MCL 24.201 *et seq.,* that required administrative agencies to obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules violated the enactment and presentment requirements of Michigan's Constitution, Const. 1963, art. 4, §§ 26 and 33.[37]

In analyzing the question presented in *Blank,* we addressed whether the challenged action – a vote of the joint committee or the Legislature itself on an administrative rule – was "legislative" in nature, so that it was subject, under the enactment and presentment requirements of Michigan's Constitution, to a majority vote of the full Legislature and gubernatorial approval.[38]

---

[37] The differences between the two concurring opinions in *Blank* and the majority opinion are not pertinent to the analysis of *Blank* as set forth in this opinion.

[38] In this case, the presentment requirement embodied in Michigan's Constitution, Const 1963, art 4, § 33, requiring that laws enacted by the Legislature be approved by the Governor before taking effect, is not at issue because the Governor signed the compacts. Thus, the issue,

(Continued on following page)

In resolving that question, we employed the analytical framework laid out by the United States Supreme Court in *Immigration & Naturalization Service v. Chadha,* 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). As we noted in *Blank,* the United States Supreme Court in *Chadha* made four observations in determining that the action challenged in that case was inherently legislative and was subject to the enactment and presentment requirements of the United States Constitution:

> First, the action "had the purpose and effect of altering . . . legal rights, duties and relations of persons . . . outside the legislative branch." Second, the action supplanted legislative action. The only way the House could have obtained the same result would have been by enacting legislation. Third, the House's action involved determinations of policy. Fourth, the constitution explicitly authorizes only four instances where one house of Congress can act alone. It does not include the authority for one house to exercise a legislative veto over duly authorized actions of the executive branch. [*Blank, supra* at 114, 611 N.W.2d 530, quoting *Chadha, supra* at 952-956, 103 S.Ct. 2764 (citations omitted).]

Applying *Chadha's* framework in *Blank,* this Court held that the challenged action was "legislative" in nature and, therefore, it was subject to the enactment and presentment requirements of Michigan's Constitution.

Because the *Chadha/Blank* framework provides necessary guidance in determining whether a challenged action constitutes "legislation" subject to the constitutional enactment requirements, I employ it in the context of this

---

as noted, is whether the compacts violate the enactment requirements of Const 1963, art 4, § 26 because they constitute legislation.

case.[39] Accordingly, in my judgment, we must consider: (1) whether the compacts at issue "'had the purpose and effect of altering . . . legal rights, duties and relations of persons . . . outside the legislative branch,'" *Blank, supra* at 114, 611 N.W.2d 530; (2) whether the Governor's action in negotiating the compacts and the Legislature's resolution vote on the compacts supplanted legislative action; (3) whether the compacts involved determinations of policy; and (4) whether Michigan's Constitution explicitly authorizes the Legislature to approve these compacts by a resolution vote even if they otherwise constitute "legislation."

i. LEGAL RIGHTS, DUTIES AND RELATIONS

The first factor, whether the compacts had the purpose and effect of altering legal rights, duties, and relations of persons outside the legislative branch, i.e.,

---

[39] Chief Justice Corrigan determines that the *Chadha/Blank* framework is not applicable to this case, despite the fact that the issue in this case is whether a certain deliberate act undertaken by a branch of our government violates the Constitution because the substance of the act constitutes "legislation," and this is specifically the issue that was addressed in *Chadha* and *Blank*. She contends that the *Chadha/Blank* framework is inapplicable because this case concerns IGRA compacts and not a legislative veto power and "our Constitution is silent regarding the proper form of legislative approval of tribal-state gaming compacts under IGRA. . . ." *Ante* at 232. However, the point of invoking *Chadha/Blank* is only to determine whether the compacts amount to legislation. If they do, Const 1963, art 4, § 22 and § 26 require that they be subject to bill-making approval. She tautologically surmises that the *Chadha/Blank* framework is not relevant because the compacts do not constitute legislation, but the very point of utilizing the *Chadha/Blank* framework is to determine *whether* the compacts constitute legislation. If so, then our Constitution is *not silent* on this issue.

whether they have a general effect upon the citizens of Michigan, addresses essentially the same question as does the definition of "legislation" in Black's Law Dictionary. That is, Black's primarily defines "legislation" as the making of positive law, and when an action has the purpose and effect of altering legal rights, duties, and relations of persons outside the legislative branch, that action is typically an exercise in positive lawmaking.

What is important to understand is that, in the absence of the challenged tribal-state compacts, gambling on the subject Indian land was *unlawful.* Gambling in the absence of a compact was unlawful pursuant to 18 USC 1166, which, as noted above, provides that, in the absence of a tribal-state compact, state laws regulating or prohibiting gambling "*shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State,*" albeit, at least for criminal laws, through federal enforcement. 18 USC 1166(a). Casino gambling in Michigan is generally unlawful. MCL 750.301. The *only* casino gambling that is authorized in Michigan is that gambling conducted in accordance with the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.201 *et seq.* However, by its express terms, the MGCRA *does not apply to "gambling on Native American land."* MCL 432.203(2)(d), (5). Thus, casino gambling on Indian land cannot be authorized and conducted pursuant to the MGCRA, which leads to the inescapable conclusion that casino gambling on Indian lands located in Michigan is,

pursuant to § 1166, subject to Michigan's general prohibition against such gambling.[40] Accordingly, under § 1166, in the absence of a tribal-state compact, casino gambling on Indian land within Michigan's borders is unlawful, and that general unlawfulness is to be enforced by the federal government.[41]

---

[40] Moreover, I find to be of significance the fact that MCL 432.203 not only expressly provides that the MGCRA is inapplicable to casino gambling on Indian lands, but it also provides:

> If a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land or land held in trust by the United States for a federally recognized Indian tribe, the legislature shall enact legislation creating a new act consistent with this act to regulate casinos that are operated on Native American land or land held in trust by the United States for a federally recognized Indian tribe. The legislation shall be passed by a simple majority of members elected to and serving in each house. [MCL 432.203(5).]

> Thus, within the framework of the MGCRA, the Legislature apparently recognized that if Michigan is granted the right to regulate gambling on Indian lands within Michigan's borders, such ensuing regulation would be "legislative" in nature and would require legislative action in accordance with the enactment requirement of Const. 1963, art. 4, § 26. In fact, the MGCRA *requires* that the Legislature pass legislation regulating gambling on Indian lands if federal law so permits. It is clear, in my judgment, that IGRA grants states, through both § 1166 and the compacting process of § 2710(d), a means of regulating gambling on Indian lands. Accordingly, pursuant not only to Const. 1963, art. 4, §§ 22 and 26, but also pursuant to the Legislature's own self-imposed mandate in MCL 432.203(5), the compacts, because they represent federally permitted state regulation of gambling on Indian lands, should have been passed by a majority of those elected to and serving in each house.

[41] My colleagues in the majority, in my judgment, simply ignore the relevance of § 1166 in determining the lawfulness, in the absence of a compact, of casino gambling on Indian land. They do this by summarily noting and relying on the fact that it is the federal government that is charged under § 1166 with enforcing the applicable state law regulations.

(Continued on following page)

Moreover, gambling on the subject Indian lands absent the challenged compacts was unlawful pursuant to 25 USC 2710(d)(1)(C). This is because, as noted, § 2710(d) provides that "[c]lass III gaming activities *shall be lawful* on Indian lands *only if* such activities are . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . ." Therefore, before these challenged compacts existed, gambling on the subject Indian lands was *unlawful.*

Thus, it becomes clear that, before the challenged compacts existed, the tribes would have been engaging in an unlawful activity had they endeavored to operate their respective casinos. It necessarily follows that the compacts had the intended purpose, and the effect, of altering legal rights and relations of Michigan citizens generally. The

---

Opinion of Corrigan, C.J., *ante* at 228-229; opinion of Kelly, J., *ante* at 238-239. As already indicated, I agree with the United States Court of Appeals for the Ninth Circuit in *Artichoke Joe's, supra* at 722, that, "the fact that the federal government retained [the enforcement] power does not change the fact that [states] may enact laws and regulations concerning gambling that have an effect [in the absence of a compact] on Indian lands." That is, the states retain *substantive* authority over gambling law on Indian lands. See n 6. Chief Justice Corrigan further states that § 1166 does not truly give the states regulatory power because "the federal government may conclude at any time that it will no longer apply state law and so amend IGRA." *Ante* at 229. While it is true that it is within Congress's power to amend IGRA, this fact is irrelevant because we are called upon to decide this case under the law as it is today, and not under the law as it could conceivably one day be. Moreover, Chief Justice Corrigan opines that Congress chose to make state casino gambling laws applicable to Indian land "for expediency." *Id.* She provides no support for this finding. The relevant legislative history indicates that Congress chose to make state gambling laws applicable to tribes not for reasons of "expediency," but to specifically give states some regulatory power over casino gambling on Indian land. See *Cheyenne River Sioux Tribe, supra* at 526.

compacts purport to allow Indian tribes to lawfully engage in activities that would otherwise be unlawful.

Moreover, the compacts impose specific duties upon both the members of the tribes and upon non-Indian peoples and entities. By way of example, the compacts impose a duty on the tribes to administer and enforce on the casinos the regulatory requirements embodied in the compacts. Further, the compacts impose a duty on local units of government to create a local revenue sharing board to receive and distribute a percentage of casino profits that the tribes are required under the compacts to disburse. Alternately, if the local units of government do not create a local revenue sharing board, it may be said that the compacts impose a duty on local units of government to expend their own government funds to cover the inevitable costs for public services, police, etc., that they will incur as a result of having a casino in their area. Under either scenario, the compacts impose duties on local units of government.[42] Accordingly, it is clear that the

---

[42] Defendants argue, and the majority concludes, that the compacts do not actually *require* the creation of local revenue sharing boards, but rather *permit* local units of government to voluntarily create such boards if they wish to enjoy the benefits of the annual percentage payment that the tribes are to make to those local units of government pursuant to the compacts. Opinion of Corrigan, C.J., *ante* at 230; opinion of Kelly, J., *ante* at 240. This argument is both flawed and disingenuous. First, as is expressly stated in the compacts themselves, the annual payment of funds by the tribe to the local revenue sharing boards is meant to "provide financial resources to those political subdivisions of the State *which actually experience increased operating costs associated with the operation of the Class III gaming facility[ies].*" See § 18(A)(ii) of the compacts. Thus, it is evident that the "choice" the local units of government have is either: (1) to create a local revenue sharing board or (2) to simply assume the *actual costs* incurred by the unit of government in the operation of the casinos. Either choice, as noted above, imposes a duty on local units of government. Moreover, I

(Continued on following page)

compacts had the intended purpose and the effect of altering the legal duties generally of Michigan citizens.

Further, the tribal-state compacts alter legal relationships because the compacts remove from the federal government the jurisdiction to enforce the applicable state gambling laws and regulations that apply, pursuant to § 1166, on Indian land in the absence of a tribal-state compact and place that jurisdiction in the hands of the tribes themselves. This change in jurisdiction affects Michigan citizens generally because citizens engaging in gambling in tribal casinos were formerly subject to federal jurisdiction, but are now subject to tribal jurisdiction. Additionally, the compacts alter the legal relationships of Michigan citizens generally because they may allow anyone over the age of eighteen to gamble in tribal casinos, whereas the legal gambling age that applies to Michigan casinos subject to the MCGRA is twenty-one.

Thus, the first factor of the *Chadha I Blank* framework leads to the conclusion that the compacts constitute legislation. That is, the compacts "had the [intended]

---

note that the compacts purport to *mandate* the creation of the local revenue sharing boards, as evidenced by the term "shall." That is, the compacts provide that "a Local Revenue Sharing Board *shall* be created by those local units of government. . . ." Thus, the compacts themselves do not purport to provide any "choice" on this matter.

My colleagues espouse a third-party beneficiary analysis in reaching their conclusion that the compacts impose no duties on local units of government. Opinion of Corrigan, C.J., *ante* at 230; opinion of Kelly, J., *ante* at 240. It may be that under contract law, the local units are indeed third-party beneficiaries. However, that is simply not dispositive, nor particularly relevant, in this case. The fact remains that local units of government must either create the revenue sharing boards or assume the actual costs incurred by the units of government in the operation of the casinos.

purpose and effect of altering . . . legal rights, duties and relations of persons . . . outside the legislative branch." *Blank, supra* at 114, 611 N.W.2d 530.

ii. Supplanting legislative action

The second *Chadha/Blank* factor requires that we consider whether the Governor's action in negotiating the compacts and the Legislature's resolution vote on the compacts "supplanted legislative action." In *Blank, supra* at 114, 611 N.W.2d 530, we further elaborated on this point, as did the United States Supreme Court in *Chadha,* by considering whether "[t]he only way the House could have [properly] obtained the same result would have been by enacting legislation." Thus, we must consider how, in the absence of the challenged compacts, the Legislature could alternatively have achieved the same result, i.e., how the Legislature could alternatively have made gambling on Indian land lawful. If no IGRA tribal-state compact exists, general state laws pertaining to the regulation or prohibition of gambling apply on any particular Indian land as they apply elsewhere in the state. 18 USC 1166. Therefore, in the absence of a compact, if the Legislature wanted to make gambling on Indian land lawful, the only way it could do that would be by either changing the gambling laws that are generally applicable within the state or by changing the reach of the MGCRA. Changing those laws would, it cannot seriously be disputed, require "legislation." Thus, it becomes clear that the compacts

effectively supplanted legislative action and, therefore, they themselves constitute "legislation."[43]

iii. DETERMINATIONS OF POLICY

The third *Chadha/Blank* factor requires that we consider whether the compacts "involved determinations of policy." *Blank, supra* at 114, 611 N.W.2d 530. The compact negotiation process required the Governor to undertake and resolve multiple policy-making decisions of great consequence to this state, the most significant of which was the initial decision to make lawful what was otherwise unlawful – casino gambling on the subject Indian lands. The fact that casino gambling engenders considerable controversy and passion throughout our society at large, as evidenced by the very existence of this lawsuit, underscores the significance of the policy decision that these compacts represent.

Moreover, the compacts represent a host of additional policy decisions that sprang from the initial decision to make gambling lawful on the subject Indian lands. These include, but certainly are not limited to, decisions regarding the number of compacts to sign and the number of casinos to allow, the minimum gambling age that would be enforced in the relevant casinos, the percentage of profits

---

[43] Furthermore, the compacts "supplant legislative action," *Blank, supra* at 114, 611 N.W.2d 530, because they attempt to bind the state to their terms for a period of twenty years, and during those twenty years, the Legislature may not, even by appropriate legislative action, amend or repeal the compacts. Thus, the compacts not only supplant current legislative actions, but in effect, they likewise supplant any future proper legislative action that the Legislature might otherwise undertake regarding this issue.

that the tribes would be required to submit to the state and the subsequent use of those funds by the state, the decision to incorporate into the compacts the protections of the Michigan Employment Security Act, MCL 421.1 *et seq.*, and the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, and the decision to leave enforcement of the compact rules and regulations to the tribes themselves rather than delegating that duty to the relevant state agencies as the state clearly could have done pursuant to 25 USC 2710(d)(3)(C).[44]

---

[44] It appears that that Court of Appeals considered significant the fact that the compacts do not give the state the power to enforce them other than by arbitration or mediation. The Court of Appeals stated, "While states may have the ability [under IGRA] to negotiate and include regulatory terms in the compacts, there is no mechanism for enforcement. Rather, any dispute is submitted to arbitration or a mediator. Consequently, the challenge to the method of approval by resolution is without merit." At 46, 657 N.W.2d at 516. Likewise, defendants emphasize, as did the Court of Appeals, *id.*, that the compacts confer no regulatory power on the state because the responsibility to ensure that the compacts' "regulatory requirements" are being enforced within the casinos lies solely within the tribes' hands; and therefore the compacts are not "legislation." However, IGRA provides that compacts may include provisions relating to "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations. . . ." 25 USC 2710(d)(3)(C)(2). Thus, the compacts *could* have granted the state the jurisdiction to enforce the relevant laws and regulations. Justice Kelly concedes that if the compacts "extend[ed] state jurisdictional authority to tribal land," they would constitute legislation. *Ante* at 229. In my judgment, the decision to place the enforcement jurisdiction entirely within the tribes' hands, as well as the decision to resolve compact disputes through mediation and arbitration, were, in fact, policy decisions made by the Governor that may not now be used to insulate the compacts from a finding that they constitute legislation. Chief Justice Corrigan likewise refers to many of the compact terms in order to support her contention that the compacts do not constitute legislation. *Ante* at 229-231. As an example, she notes that "[u]nder the

(Continued on following page)

In my judgment, these policy decisions are exactly the sorts of decisions that properly belong within the province of the Legislature.[45] This point was well made by the highest court for the state of New York, the Court of Appeals of New York, in a decision in which that Court held that IGRA tribal-state compacts represent legislation. In *Saratoga Co. Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 822-823, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (2003), the Court stated:

> IGRA itself contemplates that states will confront several policy choices when negotiating gaming compacts. Congress provided that potential conflicts may be resolved in the compact itself, explicitly noting the many policies affected by tribal gaming compacts. Indeed, gaming compacts are laden with policy choices, as Congress well recognized.
>
> "Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

---

terms of the compacts, the tribes themselves, not the State, regulate the conduct of Class III gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the State unilaterally enforce a violation of the compacts." *Ante* at 230. This term, and the other compact terms discussed in the Chief Justice's opinion, were the direct result of policy choices made on behalf of the state by the Governor and should not now be used circularly to insulate the compacts from being characterized as legislation. It is, in part, precisely because the compacts resolve such fundamental policy choices that they constitute legislation.

[45] As noted in n 16, MCL 432.203 indicates that the Legislature itself recognized this when it provided in the MGCRA that the *Legislature* must, if permitted by federal law, enact an act similar to and consistent with the MGCRA that would govern casino gambling in Indian territory, just as the MGCRA governs other casino gambling that is authorized in Michigan.

"(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

"(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

"(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

"(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

"(v) remedies for breach of contract;

"(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

"(vii) any other subjects that are directly related to the operation of gaming activities."

[25 USC 2710(d)(3)(C).]

Compacts addressing these issues necessarily make fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under our constitutional structure. [Emphasis added.]

I agree with the court's decision on this issue in *Saratoga Co* and with the other state supreme courts that have considered this issue and reached a similar conclusion. See *State ex rel Clark v. Johnson,* 120 N.M. 562, 904 P.2d 11 (1995); *State ex rel Stephan v. Finney,* 251 Kan.

559, 836 P.2d 1169 (1992); *Panzer v. Doyle,* 271 Wis.2d 295, 680 N.W.2d 666 (2004); *Narragansett Indian Tribe of Rhode Island v. Rhode Island,* 667 A.2d 280 (RI, 1995).[46] It is evident that the compacts "involved determinations of policy," *Blank, supra* at 114, 611 N.W.2d 530, such that they themselves constitute "legislation."

iv. Michigan Constitution

The fourth Chadha/Blank factor requires that we consider whether Michigan's Constitution explicitly authorizes the Legislature to approve these compacts by resolution even if the compacts otherwise constitute legislation.

Before 1908, the Michigan Constitution allowed the Legislature to make laws by the resolution process. See Const. 1850, art. 4, § 19. However, the constitutions of 1908 and 1963 leave out that earlier proviso, and our Constitution now makes it entirely clear, as already

[46] My research revealed that every state supreme court that has directly considered this issue has held that tribal-state gaming contracts constitute legislation. The majority cites to *Confederated Tribes of the Chehalis Reservation v. Johnson,* 135 Wash.2d 734, 750, 958 P.2d 260 (1998), for an opposite conclusion. Opinion of Corrigan, C.J., *ante* at 229; opinion of Kelly, J., *ante* at 241. In that case, the Supreme Court of Washington stated that tribal-state compacts are "agreements" and not legislation. However, the issue in that case was whether the compacts were subject to Washington's public records disclosure act, and the court's statement regarding the legislative nature of a compact, which was made with no analysis whatever, was therefore not in response to a direct consideration of that question. Justice Kelly likewise string cites *Confederated Tribes of Siletz Indians of Oregon v. Oregon,* 143 F.3d 481 (C.A.9, 1998), and *Gallegos v. Pueblo of Tesuque,* 132 N.M. 207, 218, 46 P.3d 668 (2002). Both those cases are equally irrelevant to the instant issue.

explained, that lawmaking is subject to the enactment requirement. See Const. 1963, art. 4, §§ 1, 22, and 26.

In *Becker v. Detroit Savings Bank,* 269 Mich. 432, 434-436, 257 N.W. 853 (1934), this Court considered whether a legislative resolution can create binding law. In accordance with our Constitution, the *Becker* Court held that it could not, stating:

> The language of the constitution is in itself a complete answer to the proposition. It provides in express terms that there shall be but one mode of enacting a "law" thereunder, and that mode is the exclusive measure of the power of the legislature in that regard. *A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.* . . . The requirements of the Constitution are not met by that method of legislation. "Nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." Cooley, [Const. Lim. at 155, ch. 6.] . . .
>
> * * *
>
> [W]hile the resolution of the Legislature is entitled to respectful consideration, it is not law and courts are bound by the law. [*Id.* at 434-436, 257 N.W. 853 (emphasis added).]

Moreover, Michigan's Constitution provides a number of specific instances in which the Legislature is explicitly authorized to act by way of resolution. See Const. 1963,

art. 4, §§ 12, 13, 37; art 5, § 2; art. 6, § 25. However, none of these provisions is applicable to this issue and none provides a basis for concluding that our Constitution explicitly grants the Legislature the authority to approve the instant compacts by way of resolution even though they otherwise constitute legislation.[47] Therefore, the Legislature's approval of the challenged compacts is not constitutionally exempted from the general lawmaking procedures embodied in our Constitution. Thus, the fourth *Chadha/Blank* factor likewise leads to a finding that the Legislature was required to adopt the compacts consistently with the enactment requirements of Michigan's Constitution.

Accordingly, in my judgment, the tribal-state compacts at issue constitute legislation. The compacts had the purpose and effect of generally altering legal rights, duties, and relations of Michigan citizens; they supplanted legislative action; they represent determinations of policy issues of fundamental importance to the social and economic environment of the state of Michigan; and our Constitution does not authorize the Legislature to approve the compacts by a resolution vote.

---

[47] The majority concludes that legislative approval by resolution was appropriate because the Constitution is a limit on our Legislature's power rather than a grant of power and, therefore, the Legislature may do anything that it is not specifically prohibited by the Constitution from doing. Opinion of Corrigan, C.J., *ante* at 231; opinion of Kelly, J., *ante* at 241-242. It may well be true that the Constitution is a limit on legislative power, but one of those limits is embodied in Const. 1963, art. 4, § 22 and § 26, and these require that legislation be by bill. The majority essentially engages in a faulty, circular argument to support the conclusion that the compacts are not legislation.

B. IS A RESOLUTION NONETHELESS CONSTITUTIONAL?

Having determined that the *Chadha / Blank* analytical framework leads to the conclusion that the compacts constitute "legislation" subject to the enactment requirement of Michigan's Constitution, I will now consider the significant issues raised by defendants and upon which the majority opinions are primarily based.

i. FEDERAL PREEMPTION

First, Justice Kelly concludes that the compacts are not "legislation" because federal law preempts Indian gambling regulation unless the state prohibits gambling. Thus, because Michigan permits limited casino gambling, Justice Kelly reasons that Michigan may not legislate with respect to gambling on Indian land. *Ante* at 237-238. In support of this proposition, the opinion refers to 25 USC 2701 of IGRA, which provides:

> The Congress finds that
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Justice Kelly has misconstrued the relevance of § 2701(5). This provision is simply a part of the Congress's legislative "findings" and does not constitute substantive

law.[48] That is, the Congress found, before enacting IGRA, that Indian tribes had the "exclusive right to regulate gaming activity on Indian lands if the gaming activity [was] not specifically prohibited by Federal law and [was] conducted within a State which did not . . . prohibit such gaming activity."[49] *Id.* Having so found, the Congress subsequently enacted IGRA in order to "provide a statutory basis for the regulation of gaming. . . ." 25 USC 2702(2). Because 25 USC 2701(5) is not substantive law, Justice Kelly errs in invoking it as such and using it to effectively shield Indian tribes from state regulation of gambling otherwise consistent with the text of IGRA.

---

[48] A "findings" statement in a federal act is a part of what is commonly referred to as the "preamble." As long ago as 1889, the United States Supreme Court, in *Yazoo & M V. R. Co. v. Thomas,* 132 U.S. 174, 10 S.Ct. 68, 33 L.Ed. 302 (1889), stated: "[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity or resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up." See also Singer, 1A Sutherland Statutory Construction (6th ed), § 20:3, p 123: "The function of the preamble is to supply reasons and explanations and not to confer power or determine rights. Hence it cannot be given the effect of enlarging the scope or effect of a statute."

[49] This congressional finding comports with the pre-IGRA opinion of the United States Supreme Court in *Cabazon* in which the Court acknowledged that if California *prohibited* casino gambling within its borders, California could enforce its criminal laws relating to that prohibition on Indian lands through 18 USC 1162; but absent express Congressional permission, California could not enforce its purely *regulatory* gambling laws on Indian lands. Thus, under *Cabazon,* Indian tribes indeed had the exclusive right to regulate casino gambling on Indian lands if the gambling was not specifically prohibited by federal law and was conducted within a state that did not prohibit such gambling.

ii. STATE AUTHORITY TO LEGISLATE

Second, defendants argue that the compacts cannot constitute legislation because the state has no authority to legislate casino gambling on Indian lands, and, therefore, the compacts merely constitute an "agreement" between the tribe and the state that has nothing to do with "legislation." However, pursuant to the express terms of IGRA itself, the Congress recognized that a tribal-state compact may result in state legislation. Therefore, it cannot be disputed that IGRA permits states to legislate pursuant to a compact. Section 2710(d)(5) of IGRA provides:

> Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any tribal-state compact entered into by the Indian tribe under paragraph (3) that is in effect.

This section both affirms that an Indian tribe's right to regulate gambling on its lands is not exclusive and that the state does, indeed, have authority to regulate gambling on Indian lands through lawmaking. The compact provisions in IGRA merely ensure that any state regulation over tribal gambling arises out of the negotiation process; they do not, however, prohibit such regulation.

The majority concludes, however, that the fact that the compacts must arise out of the negotiation process means that they do not constitute "legislation" because legislation must be "unilateral." Opinion of Corrigan, C.J., *ante* at 226; opinion of Kelly, J., *ante* at 239-240. That is, if a tribal-state compact, and thus any state regulation over tribal gambling, can only result through a federally mandated negotiation process, it cannot be said that the

state enjoys a right to "unilaterally" legislate gambling on Indian land. In support of this theory – that unless a state may "unilaterally" regulate, it may not "legislate" – Justice Kelly refers to this Court's opinion in *Westervelt v. Natural Resources Comm.*, 402 Mich. 412, 440, 263 N.W.2d 564 (1978). *Ante* at 239-240.

Westervelt considered whether an executive agency "legislates" when it engages in rulemaking pursuant to a legislative delegation of power. If so, the executive agency would be violating the separation of powers doctrine embodied in Const 1963, art 3, § 2 because, pursuant to Const 1963, art 4, § 1, "[t]he legislative power of the State of Michigan is vested in [the Legislature]."[50] *Westervelt,* in concluding that an executive agency does not legislate when it engages in rulemaking, stated, "the concept of 'legislation,' in its essential sense, is the power to speak on any subject without any specified limitations." *Westervelt, supra* at 440, 263 N.W.2d 564. (Emphasis deleted). The "specified limitations" referred to in *Westervelt* were those limitations inherent in the legislative delegation of authority to the executive branch. Because an executive agency is confined in its exercise of authority to the relevant legislative delegation, including any specific limitations upon such delegation set by the Legislature, the power to engage in rulemaking is not a power to "legislate." It could not be such a power under the Constitution if the delegation is valid because the Constitution does not allow any

---

[50] Compare the United States Constitution, art I, § 1, in which "*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis added.)

entity to exercise "legislative power" other than the Legislature.[51]

Justice Kelly argues that the power to speak "without any specified limitations" means the power to "unilaterally" legislate. In this case, she argues, the Legislature may not speak "without specified limitations" because it is limited by the mandate that the state must negotiate in good faith with the tribes and, therefore, it may not legislate. *Ante* at 239-240. In my judgment, *Westervelt* must be interpreted within the different context of that case. I see no reason to expand its specific holding to mean that any time the Legislature is constricted in any sense by "any specified limitation," it may not "legislate." A legislature is always subject to "specified limitations," such as those posed by the federal and state constitutions, or, in this case, by federal law. Indeed, the very premise of our constitutional system is that all governmental institutions operate under "specified limitations." The fact that federal law imposes some limits on the state's power to regulate in a specific area simply cannot mean that any legislative action touching upon such an area is not actually "legislation."

Chief Justice Corrigan, in support of her contention that the state has no power to "unilaterally" regulate, and therefore legislate, tribal gambling under § 2710(d), cites

---

[51] *Westervelt,* considered in its totality, actually supports plaintiffs' position in this case. This is because the compacts constitute legislation, yet the legislative power is exclusively vested in the Legislature. Const 1963, art 4, § 1. Thus, when the Governor negotiated and signed the compacts without having first received a proper delegation of power from the Legislature, he effectively exercised the Legislature's functions in contravention of Const 1963, art 3, § 2.

Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N.W. 628 (1908), and *Detroit v. Michigan Pub Utilities Comm* (*MPUC*), 288 Mich. 267, 286 N.W. 368 (1939), for the proposition that the power to legislate does not require "consent" from those subject to its powers. *Ante* at 226. Because § 2710(d) provides for a process of negotiation, the Chief Justice opines that it gives tribes a power to "consent" that negates a finding that a compact constitutes legislation. In *Boerth* and *MPUC*, this Court held that, absent a legislative delegation of power to Detroit, Detroit possessed no legislative power to set gas rates because such power was within the exclusive jurisdiction of the Legislature. However, Detroit was found to possess a power to contract for reasonable gas rates under its power to control its streets. In this case, the state possesses regulatory power over tribal casino gambling even in the absence of a compact, see § 1166, including the outright power to prohibit such gambling. Moreover, the "consent" that the Chief Justice argues that the tribes may exercise in this case, by virtue of § 2710(d), is the type of "consent" referred to in *Boerth* and *MPUC*. Although § 2710(d) provides for a negotiation process, the tribes are *not* wholly free to withhold their "consent" from the Legislature to enter into contracts regulating casino gambling on their lands and to, instead, engage in such gambling without compacts. This is because in the absence of a compact, casino gambling is *unlawful*. § 2710(d)(1).[52]

[52] I do not accept the premise of the Chief Justice that, when a state exercises its regulatory authority over casino gambling within its borders, expressly granted to it by Congress, and makes that which was unlawful into that which is lawful, and in doing so binds itself to specific terms and conditions under which that which was unlawful is now lawful, the state is not "legislating" merely because IGRA provides

(Continued on following page)

iii. CONTRACTUAL NATURE OF COMPACTS

Third, the majority concludes that the tribal-state compacts are not legislation because they merely constitute contracts between two sovereign entities that the Governor, pursuant to IGRA, may enter into on behalf of the state and that the Legislature may approve of by resolution vote.[53] Opinion of Corrigan, C.J., *ante* at 226; opinion of Kelly, J., *ante* at 239-240. I do not dispute that the compacts are akin to contracts of a unique nature. However, as explained above, these "contracts" create new law and constitute legislation and they purport to bind the state of Michigan to that legislation. That is the pivotal consideration in this case. A "contract" may, in effect, create new law and such a legislative contract should not be exempt from the constitutional provisions otherwise

---

a mechanism by which the tribes may participate in the negotiation process. The pertinent consideration in determining whether a compact constitutes legislation is not whether IGRA purports to compel a state to negotiate in good faith with a tribe, but rather whether the compact bears the larger hallmarks of "legislation." These hallmarks are sufficiently expounded upon in *Chadha/Blank*, and, as already discussed, I believe they lead to the conclusion that these sorts of compacts constitute legislation.

[53] If the majority were correct, but for the term in the compacts themselves stipulating that they become effective only upon resolution approval by the Legislature, the Legislature would not be required to approve them. This is because the Legislature's power is the power to legislate. Const. 1963, art. 4, § 1. Therefore, unless the compacts constitute legislation, neither the Constitution nor any other source of law would require that they be approved by the Legislature by any method. Thus, under the majority's faulty analysis, there is no reason that the Governor, in the future, cannot simply bind the state to casino compacts without even seeking resolution approval from the Legislature.

Thus, the compacts would have been effective between the state and the tribe once they had been signed by the Governor.

applicable to legislation.[54] Neither the executive nor the legislative branch of our state government may circumvent the constitutionally mandated processes for enacting legislation by entering into a contractual relationship. However, I will consider whether there is some source of law that *does* allow the Governor to enter into a compact without legislative approval consistently with the enactment requirement of Michigan's Constitution.

First, it should be considered whether IGRA itself, regardless of state constitutional procedures, provides that a Governor may enter into a tribal-state compact with only a resolution vote of the Legislature. It is clear that IGRA does not so provide. The court in *Saratoga Co, supra* at 822, 766 N.Y.S.2d 654, 798 N.E.2d 1047, stated:

> IGRA imposes on "the State" an obligation to negotiate in good faith (25 USC 2710[d][3][a]), but identifies no particular state actor who shall negotiate the compacts; *that question is left up to state law*. . . . As the Supreme Court noted, the duty to negotiate imposed by IGRA "is not of the sort likely to be performed by an individual state executive officer or even a group of officers." [Quoting *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 75 n. 17, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), citing *State ex rel Stephan v. Finney, supra.*]

---

[54] See *Flint & F Plank-Road Co. v. Woodhull,* 25 Mich. 99, (1872), in which Justice Cooley acknowledged that a charter-compact is both a "law" *and* a contract. "It is not disputed . . . that the charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the State. . . . *Such a charter is a law,* [and] it . . . also . . . contains stipulations which are terms of compact between the State as the one party, and the corporators as the other. . . ." *Id.* at 101. (Emphasis added.) Thus, a "contract" may clearly be a vehicle for creating both legislation and contractual terms that are binding on the state.

Likewise, in *Clark, supra* at 577, 904 P.2d 11, the Supreme Court of New Mexico stated:

> We entertain no doubts that Congress could, if it so desired, enact legislation legalizing all forms of gambling on all Indian lands in whatever state they may occur. . . . That is, however, not the course that Congress chose. Rather, Congress sought to give the states a role in the process. . . . It did so by permitting Class III gaming only on those Indian lands where a negotiated compact is in effect between the state and the tribe. [25 USC 2710(d)(1)(C).] To this end, the language of the IGRA provides that "Any *State* . . . may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian Tribe." *Id.* § 2710(d)(3)(B). The only reasonable interpretation of this language is that it authorizes state officials, *acting pursuant to their authority held under state law,* to enter into gaming compacts on behalf of the state. [Emphasis added.]

Accordingly, IGRA does not provide or require that the Governor shall have the power to bind the state to tribal-state compacts with only a resolution vote of the Legislature. The pertinent consideration is which state actor has the power to bind the state to a legislative compact and according to which procedures *under state law.*[55]

---

[55] Because IGRA does not purport to require or allow the Governor to negotiate a tribal-state compact subject only to a resolution vote, we need not consider whether such a provision in the IGRA would be lawful. However, I note the following statement made by the court in *Clark, supra* at 577, 904 P.2d 11:

> [The governor] . . . argues that he possesses the authority, as a matter of *federal law,* to bind the State to the terms of the compact. . . . We find the Governor's argument on these points to be inconsistent with core principles of federalism. The Governor has

(Continued on following page)

Second, it is therefore necessary to consider whether state law grants the Governor the authority to bind the state to a tribal-state compact with only a resolution vote of the Legislature regardless whether that compact constitutes legislation. The Michigan Constitution provides that "[t]he executive power is vested in the governor." Const 1963, art 5, § 1. The majority essentially argues that the executive power includes the power to bind the states to contractual agreements with sovereign entities and, therefore, whether those agreements otherwise constitute "legislation" is irrelevant. The "executive power" is, first and foremost, the power to enforce. This observation was concisely summed up by this Court in *People ex rel Attorney General v. Holschuh,* 235 Mich. 272, 274-275, 209 N.W. 158 (1926), in which we stated, "Consideration of some fundamental principles relative to the powers of government will aid greatly in determining the issues before us.... The law ... must observe constitutional limitations; but within such limitations the legislative power may command, *the executive power must enforce,* and the

---

only such authority as is given to him by our state Constitution and statutes enacted pursuant to it.... We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power. Cf. *Gregory* [*v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct 2395, 115 L.Ed.2d 410 (1991)] (recognizing that "[t]hrough the structure of its government ... a State defines itself as a sovereign"); *New York v. United States,* [505 U.S. 144, 176, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)] (striking down an act of Congress on the ground that principles of federalism will not permit Congress to "'commandeer[ ] the legislative processes of the States'" by directly compelling the states to act) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* [452 U.S. 264, 288, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981)]).....

judicial power respond." (Emphasis added.)[56] While our state Constitution grants specific additional powers to our executive branch of government beyond the "enforcement" of legislative enactments, I find no provision in our Constitution that supports a finding that the Governor possesses broad powers to bind the state to legislative compacts with foreign sovereignties absent legislative action consistent with the enactment requirement. Nor have my colleagues pointed to any language of that sort.

In addressing this issue, it is also necessary to consider what our Constitution does say regarding the Governor's right to bind the state to an "intergovernmental agreement." Const 1963, art 3, § 5 provides:

> Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. . . .

---

[56] See Const. 1963, art. 5, § 8: "The governor shall take care that the laws be faithfully executed." See also *The People ex rel Sutherland v. Governor*, 29 Mich. 320, 324-325 (1874), in which Justice Cooley stated: "And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, *while the third must see that the laws are executed.* This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others." (Emphasis added.)

Thus, pursuant to this constitutional provision, the Governor of this state may enter into intergovernmental agreements without the advice or consent of the Legislature – whether by resolution vote or consistently with the enactment requirements of our Constitution. However, this power is not unlimited. First, it is specifically limited to agreements with "the other states, the United States, the Dominion of Canada, or any political subdivision thereof." The power to enter into an intergovernmental agreement with an Indian tribe is conspicuously absent. Second, the power is specifically limited to those agreements necessary "for the performance, financing or execution of [its] functions." Neither IGRA nor any other law places the duty or the power to determine the scope and parameters of gambling within Michigan's borders, on or off Indian lands, within the "functions" of the executive branch. Accordingly, unless the Legislature properly delegates to the executive branch a rulemaking power to set the parameters for gambling on Indian lands within Michigan's borders, that power is not, in my judgment, reasonably within the scope of the executive branch's "functions."

It may be said that because the intergovernmental agreement provision of the Michigan Constitution does not refer to agreements with Indian tribes that provision is inapplicable to this case. However, in light of the fact that the powers of the executive branch are constitutionally defined, I read additionally a negative implication in Const 1963, art 3, § 5. Because our Constitution contains an express provision regarding intergovernmental agreements that may validly be entered into by governmental authorities, I conclude that, subject to provisions of general

law, intergovernmental agreements beyond the scope of Const 1963, art 3, § 5 are invalid.[57]

Moreover, even were I to decline to read a negative implication into Const 1963, art 3, § 5, this provision is, nonetheless, significant insofar as it expressly provides that, in the realm of applicable intergovernmental agreements, no branch of the government may contract in such a way that is *inconsistent* with its own powers or that usurps the powers of another branch. That rule, which is consistent with the separation of powers doctrine of Const 1963, art 3, § 2, should apply equally to intergovernmental agreements that are expressly subject to Const 1963, art 3, § 5, as well as those that are not. Thus, in any case, a governmental authority may only bind the state to an intergovernmental agreement that is "for the performance, financing or execution *of their respective functions. . . .*" *Id.* As already noted, absent a proper legislative delegation of power to the executive branch, the duty and power to set the parameters for casino gambling on land within Michigan's borders is not in any comprehensible sense a "function" of the executive branch.

---

[57] Const. 1963, art. 3, § 5 provides that it is "subject to general law." Therefore, a governmental authority may enter into an intergovernmental agreement with an Indian tribe despite the fact that tribes are not specifically mentioned in art. 3, § 5 provided the agreement is consistent with provisions of general law. Federal law, under IGRA, permits a state to enter into a tribal-state gambling compact. However, because the compacts at issue constitute legislation, state law, particularly Const. 1963, art. 4, §§ 22 and 26, requires that they be approved by the Legislature by bill. Therefore, consistently with these provisions of general law, the Legislature may bind the state to tribal-state gambling compacts despite the fact that "Indian tribes" are not specifically referenced in art. 3, § 5.

The United States Constitution expressly provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . . ." U.S. Const, art II, § 2, cl 2.[58] The Michigan Constitution notably contains no explicit authorization for the Governor to enter into treaties with sovereign nations without the majority approval of the entire Legislature. I have found no case law, nor have my colleagues identified such a law, that would support a determination that, despite our Constitution's silence on the issue, such a right exists.[59]

---

[58] It is noteworthy that federal case law acknowledges that treaties are both agreements with other sovereignties, *and* they create "law." See *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng,* 525 U.S. 155, 167, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999), in which the United States Supreme Court stated: "'Because *a treaty* ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux preparatoires*) [italics in original] and the post-ratification understanding of the contracting parties.'" (Citation omitted; emphasis added.) The point is that, pursuant to U.S. Const., art. II, § 2, treaties are binding *even though they amount to lawmaking* because the federal Constitution expressly so provides. Thus, that the tribal-state compacts at issue here are akin to contracts with a sovereign power does not, by that fact alone, mean that the compacts do not constitute "lawmaking." I believe the majority's conclusion that the compacts are not legislation simply because they are "contracts" with sovereign nations to be without merit. See also n. 30.

[59] Does the Governor possesses some "inherent" authority to bind the state to a legislative compact with only a resolution vote of the Legislature, or indeed unilaterally? While the Governor has the power to issue executive orders on his own accord that have the status of enacted law, the permissible scope of such orders is limited by the express powers constitutionally or legislatively delegated to the Governor. See, generally, *House Speaker v. Governor, supra* at 578-579, 506 N.W.2d 190; see also *Straus v. Governor,* 230 Mich.App. 222, 228-230, 583 N.W.2d 520 (1998). Further, the separation of powers doctrine

(Continued on following page)

I believe that no source of law, federal or state, exists that would permit the Governor to bind the state to these legislative compacts without the approval of the Legislature consistent with the enactment requirements of Michigan's Constitution. Because the compacts constitute legislation, they were subject to Const 1963, art 4, §§ 22 and 26. Therefore, I would reverse the judgment of the Court of Appeals on this issue and hold that the approval of HCR 115 by resolution, rather than by bill, did not comport with the enactment requirement of our Constitution.[60]

C. DO AMENDATORY PROVISIONS VIOLATE THE CONSTITUTION?

Each of the challenged tribal-state compacts contains a provision that purports to empower the Governor to

---

embodied in Michigan's Constitution provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch *except as expressly provided in this constitution.*" Const. 1963, art. 3, § 2. Tribal-state compacts constitute legislation, and all legislative power is constitutionally vested in the Legislature. Const. 1963, art. 4, § 1. Therefore, the Governor may not bind the state to such a compact under some "inherent" power because the Governor may exercise legislative powers only "as expressly provided in this constitution." Const. 1963, art. 3, § 2. Nowhere does our Constitution expressly, or otherwise, grant the Governor a power to bind the state to a legislative agreement with another sovereignty.

[60] The pertinent question in this case is whether the compacts constitute legislation. Because they do, the Legislature should have approved HCR 15 by bill. If the compacts did not constitute legislation, then no legislative approval, by either bill or resolution, would have been *constitutionally* required. In that case, the Legislature would have been required to approve the compacts only because the compacts themselves expressly required it in § 11, and either resolution or bill approval of HCR 115 would have been sufficient.

amend it on behalf of the state without seeking legislative approval of any specific amendment.[61] This provision, plaintiffs contend, violates the separation of powers doctrine embodied in art 3, § 2 of Michigan's Constitution because it grants broad authority to the Governor to usurp a legislative power. That is, plaintiffs argue that, like the original compacts, any amendment constitutes "legislation" that is subject anew to the enactment requirement of Const 1963, art 4, § 26. Plaintiffs essentially argue that even had the Legislature properly adopted the compacts, the specific amendatory provision would nonetheless violate the separation of powers doctrine because the Legislature may not, even by properly enacted legislation, grant the Governor a general power to amend that legislation. Defendants contend, on the other hand, that the amendments to the compacts, like the compacts themselves, in no way implicate "legislation," and, therefore, the Governor does not usurp legislative functions in exercising his power to amend them.

The Court of Appeals ruled that this issue was not ripe for review because the Governor had not yet attempted to amend the compacts. However, during the pendency of this suit, Governor Granholm purported to amend the compact with the Odawa Tribe by (1) extending the terms of the compact from twenty to twenty-five years, (2) requiring the eight percent semiannual payment that the tribes must make to the Michigan Strategic Fund to instead be made "to the State . . . as the governor so directs," (3) increasing the semiannual payment from eight percent of profits to either eight, ten, or twelve percent

[61] See § 16 of the compacts.

depending on the profits of the casino, and (4) providing less restrictive limitations on gaming by requiring the tribe to make the semiannual payments to the state only as long as the state does not authorize new gaming in ten specified counties rather than statewide as under the original compact terms. Accordingly, this issue is at present ripe for review.[62]

As long ago as 1874, this Court recognized the importance of respecting the proper lines of demarcation between the practices of our three branches of government. In *Sutherland, supra* at 324-325, Justice Cooley stated:

> And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. . . . *This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.* [Emphasis added.]

This "broad general principle" elaborated upon by Justice Cooley in *Sutherland* is what is now embodied in

---

[62] The majority concludes that the issue may now be ripe for review, but that this Court should nonetheless decline to review it because the lower courts did not assess this issue. Opinion of Corrigan, C.J., *ante* at 234; opinion of Kelly, J., *ante* at 242. It is true that the Court of Appeals declined to address the issue. However, the circuit court considered it and found a constitutional violation. Further, the parties briefed this issue and, in my judgment, the record is sufficiently developed that we may consider this question without having to first remand it to the lower courts.

the separation of powers doctrine of Michigan's Constitution. Art. 3, § 2 of our Constitution provides, "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const. 1963, art. 4, § 1. Thus, the Governor may not exercise legislative power unless expressly provided for in the Constitution. Yet, the amendatory provision of the tribal-state compacts purports to grant the Governor a broad and undefined legislative power – the power to amend legislation. The Legislature may not, either by resolution or by bill, delegate to the executive branch a broad and undefined power to amend legislation. Thus, I would reverse the judgment of the Court of Appeals on this issue and hold that the amendatory provision contained in each compact violates the separation of powers doctrine and is, thus, void insofar as it may be regarded as granting sole amendatory power over legislation to the Governor.[63]

---

[63] Justice Kelly concludes that plaintiffs' challenge to the amendatory provision fails because plaintiffs cannot show that "no set of circumstances exists under which the [a]ct would be valid." *Ante* at 242. She explains that "[t]here are many conceivable amendments that a governor might make to these compacts. For example, a governor could amend the provision relating to dispute resolution or the provision about the timing of payments." *Id.* at 18, 583 N.W.2d 520. For reasons already explained in part III(A) of this opinion, Justice Kelly's examples represent legislative decisions that are properly within the province of the Legislature. That is, such amendment would constitute important policy decisions undertaken in the process of lawmaking and they would supplant legislative action. Therefore, such amendments, undertaken by the Governor and not approved by the Legislature

(Continued on following page)

D. DO COMPACTS CONSTITUTE LOCAL ACTS?

For the reasons set forth in part VI of Chief Justice Corrigan's lead opinion, I do not believe that the compacts violate Const. 1963, art. 4, § 29. Accordingly, on this issue, I concur in the lead opinion that the decisions of the lower courts should be affirmed.

E. CONCLUSION & CONSEQUENCES

We have been asked to consider, in an action seeking declaratory relief, whether the four tribal-state compacts at issue are inconsistent with various procedures and doctrines embodied in Michigan's Constitution. Having considered the questions presented, I strongly dissent from the majority judgment that these compacts have been effected consistently with our Constitution. I would hold that these compacts constitute legislation and, thus, were subject to legislative approval consistent with the lawmaking procedures of art. 4, §§ 22 and 26 of our Constitution. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court on this issue.

Further, in my judgment, the provision in the compacts that purports to empower the Governor with sole amendatory power over their covenants violates the separation of powers doctrine of art. 3, § 2 of our Constitution. I therefore would hold that this provision is void insofar as it grants sole amendatory power over legislation

---

pursuant to Const. 1963, art. 4, §§ 22 and 26 would offend the separation of powers doctrine. Justice Kelly has not demonstrated that there are, in fact, "conceivable amendments that a governor might make to these compacts," *id.*, so as to not offend this doctrine.

to the Governor. Absent a proper delegation of power to the executive branch, amendments of the compacts must themselves comport with the bill-making enactment procedures of our Constitution. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court on this issue as well.

Finally, I believe that the compacts do not violate the local acts provision of art. 4, § 29 of our Constitution. Accordingly, on this issue, I concur with the analysis as set forth in part VI of the lead opinion, and would affirm the decisions of the lower courts.

Concerning the consequences of this opinion for the casinos operated by defendants, I would afford plaintiffs no more relief than that requested. That is, in this action for declaratory judgment, I have sought only to say what the Constitution requires of the compact process. In order to assess the consequences of this requirement for the compacts at issue, other considerations must necessarily come into play, including the standards to be applied by the Secretary of the Interior, pursuant to 25 USC 2710(d)(8), in approving a compact, in particular, a compact approved through procedures apparently acquiesced in by the executive and legislative branches of a state;[64] the

[64] Generally, deliberate acts of any of the three branches of government are presumed constitutional and, moreover, "state officials and those with whom they deal are entitled to rely on a presumptively valid state [act], [performed] in good faith and by no means plainly unlawful." See *Lemon v. Kurtzman,* 411 U.S. 192, 209, 93 S.Ct. 1463, 36 L.Ed.2d 151 (1973). See also *Thompson v. Washington,* 179 U.S. App DC 357, 551 F.2d 1316 (1977), *Bd of Comm'rs of Wood Dale Pub. Library Dist. v. Co. of Du Page,* 103 Ill.2d 422, 83 Ill.Dec. 224, 469 N.E.2d 1370 (1984), and, of significant interest, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.,* 2002 WL 1592596 (W.D.Mich., 2002).

standards by which the Secretary of the Interior will revisit prior approval of a compact;[65] and various equitable considerations pertinent to casinos that have already been built and are presently operating.

The analyses of the majority are deeply flawed and circular. As is typical in cases of this sort, the long-term consequences of the majority judgment cannot be fully predicted, but what is predictable is that there will be consequences in terms of the relationships between the branches of government. The result of the majority's analyses in this case is that a matter of fundamental policy concern to the people of this state – casino gambling and its social and economic impact – a realm in which the federal government has unequivocally authorized Michigan to exercise regulatory authority, has now been transformed into the exclusive province of a single public official, the Governor.[66] By concluding that tribal-state

---

[65] The compacts at issue have already been approved by the Secretary of the Interior, and any declaratory judgment along the lines of this dissenting opinion would not, without further action by the Secretary, render such approval null and void.

[66] Moreover, I fear that the majority's "contractual" approach to Michigan constitutional law in this case cannot be cabined to apply only to tribal-state casino gambling compacts, and do not understand why it would not be equally applicable to *any* compact between Michigan and an Indian tribe, a sister state, or a sovereign nation to which the Governor may be inclined to unilaterally bind the state. The majority appears to grant the Governor a broad power, not even implicitly recognized in the Michigan Constitution, to bind the state as the Governor sees fit, as long as the Governor does so within the framework of the majority's "contractual" approach to compacts, i.e., an approach in which state compacts can be fully understood through resort to the four corners of the compact itself and without consideration to surrounding constitutional circumstances, including the Constitution's separation of powers doctrine, its legislative processes, and the specific limitations it places upon the individual branches of government.

casino gambling compacts do not constitute legislation, and are not required to conform to the legislative process set forth in the Michigan Constitution, the majority has effectively ensured that in future cases the Legislature's role in approving such compacts will exist merely at the sufferance of the Governor. That is, according to the understanding of the majority, unless the Governor agrees in future compacts to affirmatively grant a role for the Legislature, it will have no role. Rather than both the executive and legislative branches being required to approve the expansion of casinos within Michigan, the approval of a single branch, the executive branch, will be sufficient.

The lead decision represents the first state supreme court decision in the United States to conclude that a tribal-state casino gambling compact does not constitute "legislation" and, therefore, does not require the approval of the branch of government that is most directly representative of the people.

---

657 N.W.2d 503

Court of Appeals of Michigan.

TAXPAYERS OF MICHIGAN AGAINST CASINOS and Laura Baird, Plaintiffs-Appellees/Cross-Appellants,

v.

The STATE of Michigan, Defendant-Appellant,
and
North American Sports Management Company, Inc, IV, and Gaming Entertainment,
LLC, Intervening-Defendants-Appellants/Cross-Appellees.

Docket Nos. 225017, 225066.

Submitted Aug. 13, 2002, at Lansing.
Decided Nov. 12, 2002, at 9:00 a.m.
Released for Publication Feb. 20, 2003.

Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, and Barris, Sott, Denn & Driker, P.L.L.C. (by *Eugene Driker, Leon S. Cohan, Morley Witus*, and *Thomas F. Cavalier*), Special Assistant Attorneys General, Detroit, for the state of Michigan.

Warner Norcross & Judd LLP (by *Robert J. Jonker, William C. Fulkerson*, and *Daniel K. DeWitt*), Grand Rapids, for Taxpayers of Michigan Against Casinos and State Representative Laura Baird.

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) and Dykema Gossett PLLC (by *Richard D. McLellan, Bruce G. Davis*, and Robert M. Horwitzi) for Gaming Entertainment, LLC.

Kimbal R. Smith, III for Senators George A. McManus, Jr., and Harry Gast, Jr., and House Speaker *Charles Perricone*, for Amici Curiae.

Before: *HOOD*, P.J., and *HOLBROOK, Jr.*, and *OWENS*, JJ.

HOOD, P.J.

Defendant, state of Michigan, appeals as of right from the trial court's determination that legislative approval, by resolution, of compacts allowing operation of casinos by Indian tribes violated provisions of the Michigan Constitution.[1] We affirm in part and reverse in part.

In 1997 and 1998, Governor John Engler negotiated compacts with four Indian tribes[2] to permit class III gaming by the tribes on eligible Indian lands in Michigan. The terms of the compacts contained various regulatory provisions. The tribes agreed to hiring criteria for their employees and management and agreed to provide benefits and disability compensation in conformance with

---

[1] Following the hearing regarding cross-motions for summary disposition, the trial court granted in part and denied in part each motion. Specifically, the trial court held that approval of the compacts by joint resolution violated Const. 1963, art. 4, § 22, requiring that all legislation shall be passed by bill. Additionally, the trial court held that Const. 1963, art. 3, § 2, governing separation of powers, was violated because of the Governor's authority to amend the compacts. Lastly, the trial court held that Const. 1963, art. 4, § 29, requiring that all local measures be approved by two-thirds of the members of each house and a majority of electors voting in the affected district, was inapplicable.

[2] The tribes involved are the Little River Band of Ottawa Indians, the band described in the compacts as the Pokagon Band of Ottawa Tribe and in the briefs as the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Potawatomi. In order to facilitate establishment of a casino, Indian tribes frequently retain consultants. Intervening defendants North American Sports Management Company, Inc., IV (dismissed from the action on August 12, 2002), and Gaming Entertainment, LLC, are consultants that provide financial and other support to Indian tribes that open and operate casinos.

Michigan law. The tribes also agreed to a minimum age requirement of eighteen years for participation in any class III game. The tribes adopted Michigan law regarding the sale and regulation of alcoholic beverages. Compact provisions addressed revenue payments to the state and to local governments and the creation of an oversight body to address the manner of distribution of revenues. However, the compacts did not provide the state with any authority to enforce the provisions of the compacts. Rather, they provided that representatives of the tribes and the state would meet to resolve any dispute regarding alleged noncompliance. If resolution could not be reached, the matter would be submitted to arbitration. The compacts provided that the Governor would endorse the compacts and concurrence in that endorsement by the Michigan Legislature would occur by "resolution." The governor had the ability to receive and agree to any amendments of the compacts.

A bill becomes law when it has the concurrence of a majority of members elected to and serving in each house. Const. 1963, art. 4, § 26. However, the approval of the compacts was submitted to the Legislature through the joint resolution process that required only a majority of voting members. The Legislature approved the compacts by a majority of voting members. House Concurrent Resolution No. 115 (December 10, 1998). The manner of approval of the compacts is challenged in this appeal.

I. The Origins of Federal Authorization for Operation of Casinos

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204-207, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987), two federally recognized Indian tribes conducted bingo

games on their reservations pursuant to an ordinance approved by the Secretary of the Interior. Other card games, including draw poker, were also played at the facility. The games were open to the general public and were played predominantly by non-Indians who came onto the Indian reservation. The games were the primary source of employment for tribal members, and the profits were the sole source of tribal income. The state of California sought to apply provisions of its penal code to preclude the gambling activity. California law permitted bingo games, as long as the games were staffed and operated by members of a designated charitable organization who were not paid for their services. Profits could only be utilized for charitable purposes, and prizes were limited to a nominal amount. The state sought to enforce these restrictions on the Indian reservations. The tribes sued in federal court for a declaration that state ordinances could not be applied against the reservation and for an injunction against any enforcement. *Id.*

The Supreme Court held that state jurisdiction over the tribes could only occur under limited circumstances:

> The Court has consistently recognized that Indian tribes retain " attributes of sovereignty over both their members and their territory," and that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States," . . . . It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided. [*Id.* at 207, 107 S.Ct. 1083 (citations omitted).]

The state alleged that congressional authority was granted by 18 USC 1162, a statute granting broad criminal jurisdiction and limited civil jurisdiction to six states,

including California, over specified areas of Indian country, and by the Organized Crime Control Act (OCCA), 18 USC 1955. However, the United States Supreme Court concluded that congressional law neither permitted regulation nor precluded operation of the gaming activities conducted by the Indian tribes. Specifically, the Court noted that California law did not ban all forms of gambling. The state itself operated a state lottery and encouraged its citizens to participate in this state-run gambling. Additionally, the state allowed parimutuel horse-race betting, and more than four hundred card rooms similar to the card rooms operated by the tribes were active in the state. When state law permitted conduct, subject to regulation, it was civil regulatory law and federal statutes did not authorize enforcement on an Indian reservation. Thus, in light of the substantial amount of gambling activity permitted and the state's active operation of a state lottery, the Supreme Court concluded that California regulated rather than prohibited gambling in general and bingo in particular. Therefore, the state could not interfere with this permitted conduct that occurred on an Indian reservation. *Cabazon, supra* at 207-214, 107 S.Ct. 1083.

The United States Supreme Court then analyzed the burden on Indian tribes when the state sought to regulate the dealings of non-Indians participating in bingo games on Indian reservations. The United States Supreme Court held that state jurisdiction was preempted if it interfered or was incompatible with federal and tribal interests reflected in tribal law. Throughout history the congressional goal was to allow Indian self-government, including self-sufficiency and economic development. After examining the congressional laws and policies designed to achieve

this goal by allowing tribal bingo enterprises, the United States Supreme Court stated:

> These policies and actions, which demonstrate the Government's approval and active promotion of tribal bingo enterprises, are of particular relevance in this case. The Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the sole source of revenues for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.
>
> * * *
>
> We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club. We therefore affirm the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion. [*Cabazon, supra* at 218-222, 107 S.Ct. 1083.]

In response to the *Cabazon* decision, Congress enacted the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*. This act explicitly authorizes licensed gaming activities on Indian lands by Indian tribes to generate tribal

revenue, 25 USC 2701(1), and promote the goals of tribal economic development and self-sufficiency, 25 USC 2701(4). The regulation of gaming activity on Indian lands is exclusively the province of the Indian tribes. 25 USC 2701(5). The operation of gaming activity by Indian tribes is permitted within a state that does not as a matter of law and public policy prohibit such gaming activity. *Id.* Class III gaming activities [3] ARE LAWFUL ON INDIAN lands only if The activities are authorized by ordinance or resolution and conducted in conformance with a tribal-state compact entered into between a tribe and a state. 25 USC 2710(d)(1)(A), (C). Upon receiving a request to enter into negotiations to complete a compact, the state "shall negotiate" in good faith to enter into such a compact. 25 USC 2701(d)(3)(A). While the compact "may" include provisions addressing application of criminal and civil law, allocation of criminal and civil jurisdiction, cost allocation, taxation, remedies for breach of contract, and operation standards, there is no provision for enforcement of these provisions. 25 USC 2701(d)(3)(C). The state must demonstrate that it has negotiated in good faith, and failed negotiations may be challenged in court and submitted to a mediator for resolution. 25 USC 2710(d)(7)(B).

II. The Federal Compact Clause

U.S. Const., art. I, § 10, cl. 3 provides:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign

[3] The parties do not dispute the classification of gaming at issue.

> Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

A compact is a contract. *Texas v. New Mexico,* 482 U.S. 124, 128, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987). For interstate agreements that fall outside the scope of the Compact Clause, congressional consent is not required. *Cuyler v. Adams,* 449 U.S. 433, 440, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). An agreement falls outside the scope of the Compact Clause when it is not directed to the formation of any combination tending to increase the political power in the States, which may encroach upon or interfere with the just supremacy of the United States. *Id.* Thus, if an agreement falls outside the scope of the Compact Clause, it will not be invalidated on the basis of lack of congressional consent. *Id.* Congressional consent to a compact elevates the interstate compact into a law of the United States. *Texas, supra.* Because an interstate compact can be categorized as both a contract and a statute, it is appropriate to look at contractual rules and rules of statutory construction in the event of an ambiguity. *Oklahoma v. New Mexico,* 501 U.S. 221, 236, 111 S.Ct. 2281, 115 L.Ed.2d 207 (1991). Accordingly, it is appropriate to look at legislative history, extrinsic evidence of the compact negotiations, and negotiation history of other interstate compacts when construing a compact. *Id.*

The use of compacts predates the United States Constitution. The Articles of Confederation contained the Compact Clause provision that was later incorporated into the United States Constitution without much explanation. *United States Steel Corp. v. Multistate Tax Comm.,* 434 U.S. 452, 459-462, 98 S.Ct. 799, 54 L.Ed.2d 682 (1978). However, historically, congressional consent was not

deemed essential to the validity of a compact. For example, in *Wharton v. Wise,* 153 U.S. 155, 168-170, 14 S.Ct. 783, 38 L.Ed. 669 (1894), the United States Supreme Court acknowledged that congressional consent was required before a state could enter into an agreement with a foreign state or before two or more states entered into "treaties, alliances, or confederations." However, the lack of congressional consent was not deemed essential to the 1785 compact between Virginia and Maryland to govern the navigation and fishing rights in the Potomac River, the Pocomoke River, and the Chesapeake Bay. *United States Steel Corp, supra* at 460, n. 10, 98 S.Ct. 799.

The validity of a compact lacking congressional approval was examined in *United States Steel Corp, supra.* As a result of a decision by the Supreme Court,[4] net income from interstate operations of a foreign corporation could be subjected to state taxation provided that the levy was nondiscriminatory and fairly apportioned to local activities that form a sufficient nexus to support the exercise of taxing power. In response to the decision, Congress authorized a study of uniform taxing standards, but there was no resulting legislation. In the interim, the Multistate Tax Compact was drafted. The compact created a Multistate Tax Commission comprised of tax administrators from member states. It authorized the study and development of state and local tax systems to create uniformity and compatibility of tax laws. The commission was also authorized to adopt uniform administrative regulations when two or more states had uniform provisions related to specified types of taxes. These regulations

[4] See *Northwestern States Portland Cement Co. v. Minnesota,* 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959).

were advisory only, and each member state had the power to reject, disregard, amend, or modify any rule or regulation promulgated by the commission. For the regulations to have any force, each state had to adopt the regulations in accordance with their own law. The commission also allowed audits that would occur on the state's behalf, provided this provision was adopted by a state by statute. Each state retained complete control over all aspects of the computation and rate of taxation, and a state could withdraw from the compact by enacting a repealing statute. The plaintiffs were multistate taxpayers "threatened with audits by the Commission." The complaint attacked the constitutionality of the compact, alleging that it, never having received the consent of Congress, was invalid under the Compact Clause.

The United States Supreme Court acknowledged that most multilateral compacts had been submitted for congressional approval, but concluded, "this historical practice, which may simply reflect considerations of caution and convenience on the part of the submitting States, is not controlling." *United States Steel Corp, supra* at 471, 98 S.Ct. 799. However, the general rule was that "'application of the Compact Clause is limited to agreements that are "directed to the formation of any combination tending to increase the political power in the States, which may encroach upon or interfere with the just supremacy of the *United States*."'" *Id.* at 471, 98 S.Ct. 799, quoting *New Hampshire v. Maine,* 426 U.S. 363, 369, 96 S.Ct. 2113, 48 L.Ed.2d 701 (1976), quoting *Virginia v. Tennessee,* 148 U.S. 503, 519, 13 S.Ct. 728, 37 L.Ed. 537 (1893). Thus, the fact that the tax compacts lacked congressional consent was not dispositive. Rather, whether the compacts enhanced "state power quoad the National Government" was the key

test. The plaintiffs alleged that the "Compact's effect" threatened federal supremacy. The Supreme Court rejected the constitutional challenges to the compact based on encroachment upon federal supremacy, enhancement of state power, and encroachment upon federal commerce power. *United States Steel Corp, supra* at 473-476, 98 S.Ct. 799.

Specifically, the Supreme Court rejected the constitutional challenges because of the appellants' failure to demonstrate aggrandized power and the failure to demonstrate that any enhanced power could be exercised, stating:

> The third aspect of the Compact's operation said to encroach upon federal commerce power involves the Commission's requirement that multistate businesses under audit file data concerning affiliated corporations. Appellants argue that the costs of compiling financial data of related corporations burden the conduct of interstate commerce for the benefit of the taxing States. *Since each State presumably could impose similar filing requirements individually, however, appellants again do not show that the Commission's practices, as auditing agent for member States, aggrandize their power or threaten federal control of commerce.* Moreover, to the extent that the Commission is engaged in joint audits, appellants' filing burdens well may be reduced.
>
> Appellants' final claim of enhanced state power with respect to commerce is that the "enforcement powers" conferred upon the Commission enable that body to exercise authority over interstate business to a greater extent than the sum of the States' authority acting individually. This claim also falls short of meeting the standard

> of *Virginia v. Tennessee.* Article VIII of the Compact authorizes the Commission to require the attendance of persons and the production of documents in connection with its audits. *The Commission, however, has no power to punish failures to comply. It must resort to the courts for compulsory process, as would any auditing agent employed by the individual States.* The only novel feature of the Commission's "enforcement powers" is the provision in Art VIII permitting the Commission to resort to the courts of any State adopting that Article. Adoption of that Article, then amounts to nothing more than reciprocal legislation for providing mutual assistance to the auditors of the member States. [*Id.* at 475-476, 13 S.Ct. 728 (emphasis added).]

The significance of this decision to the case pending before this Court is two-fold. The consent or approval of compacts is the result of historic practice based on caution or convenience, and the procedure for approval, whether by resolution or legislation, has not been mandated by law.[5] The key test to determine the validity of a compact, in the absence of congressional approval, was an examination of the power structure that was established by the contracting states in relationship to the federal government. Additionally, the allegation of enhanced power

---

[5] Despite the creation of rules governing establishment of a compact, there do not appear to be any uniform rules of procedure for congressional consent. For example, Congress approved a compact between the state of Ohio and Commonwealth of Pennsylvania addressing Pymatuning Lake as an act of Congress, 75 P.L. 398; 50 Stat. 865 (1937), but a compact of free association was passed by joint resolution, 99 P.L. 658; 100 Stat. 3672 (1986). There does not appear to be a rule of procedure to determine whether an act or a joint resolution may be utilized as the method of congressional consent.

through compacts was insufficient to void the compact where there was an inability to exercise that power.

III. Michigan Law Addressing Compacts

While federal law has been established to govern the construction and interpretation of a compact and the necessity of congressional consent or approval, Michigan has not delineated standards for passage of compacts or contracts. However, two Michigan appellate court decisions contain dicta that address compacts. In 1990, pursuant to the IGRA, several Indian tribes filed suit against Governor Engler to compel him to enter into a gaming compact. *Tiger Stadium Fan Club, Inc. v. Governor,* 217 Mich.App. 439, 443, 553 N.W.2d 7 (1996). Before trial, the parties entered into a consent judgment. This consent judgment provided that the tribes would make semiannual payments of eight percent of gaming revenues to the Michigan Strategic Fund (MSF), a public corporation established by the Michigan Strategic Fund Act, M.C.L. § 125.2001 *et seq.;* for a specified period. Additionally, the tribes would make payments of two percent of certain gaming revenues to local units of government in the immediate vicinity of each tribal casino. The consent judgment became effective upon execution and approval of the compacts by resolution of the Legislature. The Legislature approved the compacts by resolution in September 1993, although the resolution did not specifically mention the payments to the MSF. However, the Legislature was aware of the terms. *Id.* at 443-444, 553 N.W.2d 7.

After the tribal casinos began making deposits to the MSF, the City of Detroit Downtown Development Authority (DDA) requested a grant. The MSF adopted a resolution

and agreed to the grant request in an amount not to exceed $55 million. This grant agreement provided that the funds would be used to assist with costs associated with infrastructure, land development, and site development necessary for the construction of a new stadium for the Detroit Tigers. A complaint was filed, alleging that the gaming revenues were state funds within the meaning of the Appropriations Clause of the state constitution and any disbursement from the fund by the MSF without an appropriation by the Legislature was a violation of the Separation of Powers Clause of the state constitution. It was also asserted that the MSF did not have the statutory authority to make a grant to the DDA. *Id.* at 448-449, 553 N.W.2d 7.

This Court concluded that the revenues involved were not public funds subject to appropriation because they were gratuitous payments negotiated by the Governor and designated for a specific purpose, and payment to and disbursement from the MSF without an act of the Legislature did not violate the Appropriations Clause. *Id.* at 452-454, 553 N.W.2d 7. The Court of Appeals also concluded that the Governor did not violate the Separation of Powers Clause by negotiating and effectuating the settlement, stating:

> We conclude, however, that because the revenues are not subject to the Appropriations Clause and are gratuitous payments for a designated purpose, no appropriation was necessary and the Governor did not usurp the Legislature's power in entering into an agreement providing for the payment of the revenues directly to the MSF and that the Separation of Powers Clause does not require legislative action before the revenues may be spent by the MSF. It has long been

> Michigan law that courts should not interfere with the actions of the Governor when he acts pursuant to constitutional or statutory authority. See *Sutherland v. Governor,* 29 Mich. 320, 328 (1874). We also observe that the Legislature was aware that the consent judgment provided that the gaming revenues were to be paid directly to the MSF. Thus, the Governor constitutionally caused the equivalent of a grant to be made, with the approval of the Legislature, to a state corporation authorized by the Legislature to receive and accept grants, gifts, and other aids. [*Id.* at 454-456.]

In a footnote, the Court of Appeals noted that the House of Representatives concurred in the tribal-state gaming compacts. However, the resolution when considered by the Senate drew criticism. It was questioned whether the Governor had the authority to negotiate the compact, whether the general procedures for enacting a law should apply, and whether the generated funds should be utilized for the construction of a team stadium. However, ultimately, the Senate approved the resolution. This Court, in dicta, rejected any concern about usurped powers:

> It is thus clear, first, that the Senate was aware of the terms of the compacts and consent judgment, including the provision for the payment of eight percent of certain gaming revenues directly to the MSF, and, second, that the Senate rejected challenges to the Governor's constitutional authority to negotiate the compacts and adopted the concurrent resolution with the intention of ratifying and approving the compacts and settlement agreement as negotiated by the Governor. We recognize that it is a separate question

> whether the concurrent resolution would constitute sufficient legislative action if the revenues were determined to be subject to appropriation, one we do not address because our decision that the revenues are not subject to appropriation makes it unnecessary to do so. Putting aside Appropriations Clause considerations, and having in mind that the Legislature ratified and approved the Governor's actions and the resulting compacts and consent judgment, we reject the argument that the Governor usurped the powers of the Legislature. [*Id.* at 455-456, n. 5, 553 N.W.2d 7.]

Thus, previously, in the context of a compact, the Legislature questioned how a compact should be approved, but took no action to implement rules regarding passage of compacts. Significantly, this Court held, albeit in dicta, that there was no usurping of power by the Governor because the Legislature ratified and approved the consent judgment through the use of a joint resolution. However, this Court may find dicta persuasive and choose to follow it. *Dykstra v. Dep't of Transp.*, 208 Mich.App. 390, 392, 528 N.W.2d 754 (1995). [6]

---

[6] We note that plaintiffs rely on an opinion of the Attorney General that concluded that the compacts should have been submitted as legislation. OAG, 1997-1998, No. 6960, p. 83 (October 21, 1997). The opinion of the Attorney General is not binding on courts as precedent, and it is questionable whether a governmental agency is even bound by an opinion of the Attorney General. *Danse Corp. v. Madison Heights*, 466 Mich. 175, 182, n. 6, 644 N.W.2d 721 (2002). Following an in-depth analysis of the historical context of tribal gaming, the historical approval of compacts, the origins of tribal gaming through IGRA, and Michigan case law, we decline the invitation to adopt the opinion of the Attorney General.

In *McCartney v. Attorney Gen.*, 231 Mich.App. 722, 724-725, 587 N.W.2d 824 (1998), the plaintiff filed suit when the defendant failed to provide six documents relating to the Governor's negotiations with three Indian tribes regarding casino gambling as requested under the Freedom of Information Act (FOIA), M.C.L. § 15.231 *et seq.* The documents were categorized as those delivered by the Governor's office to the defendant, seeking legal advice, and internal memoranda of the defendant with regard to the legal advice. The trial court held that the documents were exempt from production under the attorney-client privilege exemption of the FOIA, M.C.L. § 15.243(1)(h), and the deliberative process exemption, M.C.L. § 15.243(1)(n). As a preliminary matter, the plaintiff alleged that the defendant and the Governor did not enjoy an attorney-client relationship with regard to the documents and that the Governor's actions were "ultra vires" or outside the scope of his authority. This Court held that there was a reasonable basis for the Governor's authority to negotiate tribal-state gaming compacts:

> The Governor is constitutionally authorized to present and recommend legislation. Const. 1963, art. 5, § 17. There is no prohibition in Michigan law that would bar the Governor's actions in negotiating a gaming compact and then presenting it to the Legislature. Several other jurisdictions have reached similar conclusions in addressing the precise issue whether a state governor has authority to negotiate gambling compacts with Indian tribes pursuant to the federal Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq.*
>
> In *State ex rel Stephan v. Finney,* 251 Kan. 559, 582-583, 836 P.2d 1169 (1992), the court held

that the governor had power to negotiate a gaming compact with an Indian tribe, but could not bind the state to the resulting terms of any compact. Absent "an appropriate delegation of power by the Kansas Legislature or legislative approval of the compact, the Governor had no power to bind the State to the terms" of the compact. *State ex rel Stephan v. Finney,* 254 Kan. 632, 635, 867 P.2d 1034 (1994). In *State ex rel Clark v. Johnson,* 120 N.M. 562, 904 P.2d 11 (1995), the court recognized that the governor could not enter into a gaming compact solely on his own authority. It held that the governor lacked constitutional authority to bind the state by unilaterally entering into compacts. *Id.* at 576, 904 P.2d 11. However, the court also recognized that the legislature could authorize the governor to enter into a gaming compact *"or ratify his actions with respect to a compact he has negotiated . . . ." Id.* at 574, 904 P.2d 11 (emphasis added). Thus, although the governor could not bind the state, he could negotiate a compact subject to legislative ratification. Finally in *Narragansett Indian Tribe of Rhode Island v. State,* 667 A.2d 280 (R.I., 1995), the court held that the governor lacked constitutional and legislative authority to bind the state to a compact negotiated by him. However, the court noted:

"We also take care to note that our opinion in no way suggests that the Governor, in his capacity as Chief Executive officer of this state, lacks the authority to advocate, to initiate, and to negotiate, short of executing, a tribal-state compact. All that we determine herein is that the Governor, absent specific authorization from the General Assembly, had no express or implied constitutional right or statutory authority to

> finally execute and bind the state to such a compact by his execution thereof. [*Id.* at 282.]" [*McCartney, supra* at 726-728, 587 N.W.2d 824.]

This Court then recognized the *Tiger Stadium* decision:

> Recently, this Court indicated that the Governor had the ability to negotiate and enter into compacts with an Indian tribe under the IGRA. In *Tiger Stadium Fan Club, Inc. v. Governor,* 217 Mich.App. 439, 553 N.W.2d 7 (1996), the Governor had been sued by Indian tribes to compel him to conclude a gaming compact. Subsequently, the Governor negotiated and entered into a consent judgment, which included a provision that certain gaming revenues would be paid into the Michigan Strategic Fund as long as the compact remained in effect. *Id.* at 443, 553 N.W.2d 7. "The consent judgment was to become effective *upon execution of compacts between the tribes and the Governor and approval of the compacts by resolution of the Legislature.*" *Id.* (emphasis added). Although the issue in *Tiger Stadium Fan Club* was different than that presented to this Court in this case (the plaintiffs in *Tiger Stadium Fan Club* were arguing that the Governor did not have authority to agree that revenues would be paid directly to the strategic fund), this Court ruled that the Governor "did not violate the Separation of Powers Clause in negotiating and effectuating the settlement." *Id.* at 454, 553 N.W.2d 7. The Governor negotiated and executed the compact and then presented it to the Legislature as part of the consent judgment. Thus, this Court acknowledged that the Governor has the ability to enter into compacts with Indian tribes, subject to the approval of the Legislature.

> We emphasize that the Governor has executive power, Const. 1963, art. 5, § 1, and the power to suggest legislation, Const. 1963, art. 5, § 17. We also emphasize that there is no constitutional impediment to the Governor's negotiating with an Indian tribe where the product of his negotiations has no effect without legislative approval. We find that there are bases upon which the Governor had authority to negotiate with the Indian tribes on proposed compacts, which were subsequently presented to the Legislature for approval. For that reason, we cannot conclude that his actions were clearly ultra vires. Rather, we conclude that the Governor did not usurp legislative power because he did not attempt to bind the Legislature or the state to any terms in the compact. He did not enact legislation or force legislation on the Legislature. In its well-reasoned opinion, the trial court also recognized that the Governor did not exceed the scope of his authority when he conducted negotiations and discussions with the Indian tribes and later presented gaming compacts to the Legislature for its approval or rejection. We agree with the trial court's analysis. [*Id.* at 728-729, 587 N.W.2d 824.]

As previously stated, this Court may adopt dicta that we find persuasive. *Dykstra, supra.* The Governor clearly had the authority to negotiate the compacts with the Indian tribes. Following these negotiations, the compacts were submitted to the Legislature for approval. This approval took the form of a joint resolution, rather than legislation. The difference between the forms of approval is that legislation receives an enhanced standard of adoption. The resolution process required only a majority of members who were present or chose to participate, not a majority of elected members. The compact agreements

were not the result of a decision by the citizenry at large or a policy choice by members of the Legislature, but rather, were the result of congressional policy in an area where state law is preempted. Accordingly, we adopt the dicta set forth in *McCartney, supra,* and *Tiger Stadium Fan Club, supra,* and reject plaintiffs' constitutional challenges as set forth in this opinion.

IV. Appellate Review

Our review of constitutional issues is de novo. *Armstrong v. Ypsilanti Charter Twp.,* 248 Mich.App. 573, 582, 640 N.W.2d 321 (2001). The party asserting the constitutional challenge has the burden of proof. *Taylor v. Gate Pharmaceuticals,* 248 Mich.App. 472, 477, 639 N.W.2d 45 (2001). Before addressing the constitutionality of a provision, this Court must examine alternative, nonconstitutional grounds that might obviate the necessity of deciding the constitutional question. *VandenBerg v. VandenBerg,* 231 Mich.App. 497, 499, 586 N.W.2d 570 (1998). Furthermore, constitutional questions will not be addressed when the issue is not ripe for review. *Dep't of Social Sers. v. Emmanuel Baptist Preschool,* 434 Mich. 380, 389, 455 N.W.2d 1 (1990).

V. The Constitutional Challenges

Plaintiffs allege that the submission of the compacts for approval through the joint resolution process instead of through the legislative process for passage of a bill violates Const. 1963, art. 4, § 22; art. 3, § 2; and art. 4, § 29.

Const. 1963, art. 4, § 22 provides: "All legislation shall be by bill and may originate in either house."

Const. 1963, art. 3, § 2 provides: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

Const. 1963, art. 4, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

However, we also note that plaintiffs repeatedly question the astuteness of the process by asserting that lame duck members, to avoid contravening the public policy of this state against casino gambling, resorted to joint resolution for approval. This assertion ignores the process through which these casinos originated. Michigan voters did not approve and could not approve of the casinos at issue. Furthermore, state legislators did not have the option of approving or disapproving casino gambling operated by Indian tribes. States that permit gambling activities, subject to regulation, may not prohibit casino gambling. *Cabazon, supra.* Indeed, this state, before the voter initiated referendum approving casinos in the city of Detroit, permitted various forms of gambling. This state authorized horse racing, M.C.L. § 431.301 *et seq.*, and

established and operates a state lottery, M.C.L. § 432.9, that is promoted through advertising. See M.C.L. § 432.41(4). Finally, a voter initiated law authorized casino gambling in the city of Detroit.[7] Thus, Michigan regulates rather than prohibits gambling. Pursuant to *Cabazon, supra,* the state cannot prohibit Indian tribal gaming. In light of statutory regulation authorizing gambling activities in this state, federal law dictates that the state negotiate compacts with Indian tribes to allow casino gambling on Indian reservations. 25 USC 2701 *et seq.*

As an initial matter, we note that the IGRA sets forth the authorization for class III gaming activities between Indian tribes and individual states in 25 USC 2710(d):

> (d) Class III gaming activities; authorization; revocation; Tribal-State compact
>
> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> (A) authorized *by an ordinance or resolution* that –
>
> (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
>
> (ii) meets the requirements of subsection (b) of this section, and

---

[7] MCL 432.202(*l*)(i) permits gambling based on a population of at least 800,000 at the time of issuance of a license. We note also that the Michigan Gaming Control and Revenue Act (MGCRA), M.C.L. § 432.201 *et seq.*, contains an exception to its application with regard to casino gambling conducted under the IGRA. M.C.L. § 432.203(2). Additionally, in the event that states are given authority by the federal government to regulate gambling on Indian tribal land, new legislation would be passed to regulate those casinos. MCL 432.203(5).

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect. [Emphasis added.]

Review of the plain language of the IGRA, *In re MCI Telecomms. Complaint,* 460 Mich. 396, 411, 596 N.W.2d 164 (1999), reveals that authorization may occur through ordinance or by resolution. In light of the acknowledged preemption in this area, see M.C.L. § 432.203(5), the resolution process is a sufficient method for approval of compacts. The approval by resolution contained in the IGRA is consistent with federal law addressing compacts. Congressional approval was generally one of historic occurrence rather than necessity. The true test of congressional approval occurs when powers of an entity are usurped. *United States Steel Corp, supra.* State legislative power cannot be usurped in this context because of the congressional decision to permit casino gambling on tribal land and the terms of the IGRA. While states may have the ability to negotiate and include regulatory terms in the compacts, there is no mechanism for enforcement. Rather, any dispute is submitted to arbitration or a mediator. Consequently, the challenge to the method of approval by resolution is without merit.

However, we also independently conclude that Const. 1963, art. 4, § 22 was not violated. Irrespective of the terms of the compacts that impose obligations on the Indian tribes themselves and the administrative functions

assumed by the state, there is no enforcement provision within compacts to ensure that the compact terms are satisfied. Similarly, irrespective of whether the terms of the compact encroach upon legislative functions, the inability to enforce those terms precludes a challenge to the constitutionality of the compact. *United States Steel Corp, supra.* There is no indication that the limited role of the states and the plenary authority held by Congress has been altered by the terms utilized in the compacts. Plaintiffs cannot theorize that the language of the compacts rises to the level of legislation, but rather has the burden of proof to establish the alleged constitutional violation. *Taylor, supra.* Plaintiffs have failed to meet this burden.[8]

Additionally, to construe a compact, we examine its history, extrinsic evidence of the negotiations concerning the compact, and the negotiation history of other compacts. *Oklahoma, supra.* Defendants allege and plaintiffs do not dispute, *Taylor supra,* that contracts executed by

---

[8] We note that, despite the extensive pleadings filed in this action, plaintiffs failed to address various facts raised by defendant. For example, defendant noted that the compacts executed in 1993 were approved by the resolution process and that a declaration that the compacts of 1998 are invalid because they were approved by resolution would necessarily negate the prior compacts. Additionally, defendant asserts, and plaintiffs do not dispute, that approval by resolution is the form of approval employed for state contracts. If, by course of conduct, contractual approval occurs through the resolution process, it is inappropriate to seek judicial interference with this legislative process. We note that the standing rules of each legislative body contain references to contracts, resolutions, and appropriations under certain circumstances. A written policy of contract approval in these rules or passage of legislation addressing approval of contracts would alleviate a challenge to the manner of contract approval. Additionally, we note that the parties failed to address what remedy would be available if we had determined that the resolution process was unconstitutional in light of Const. 1963, art. 1, § 10.

the state of Michigan are routinely approved by the resolution process. Furthermore, in 1993, compacts were approved by the resolution process. *Tiger Stadium Fan Club, supra.* The Legislature has a prior course of conduct, albeit unwritten, for approval of contracts. "Neither an administrative agency nor the judicial branch should trump the legislative process." *Michigan Gaming Institute, Inc. v. State Bd. of Ed.,* 211 Mich.App. 514, 522, 536 N.W.2d 289 (1995), rev'd on other grounds 451 Mich. 899, 547 N.W.2d 882 (1996).[9]

Plaintiffs next allege that the compacts violate the Separation of Powers Clause, Const. 1963, art. 3, § 2, because the compacts give the Governor the authority to amend the compacts without a provision for legislative approval of the amendments. We disagree. Constitutional questions will not be addressed when the issue is not ripe for review. *Emmanuel Baptist, supra.* There is no indication that amendment was requested or made in this manner. Accordingly, this issue is not ripe for appellate review.

Lastly, plaintiffs allege that the compacts violated the provision requiring passage of legislation affecting local

---

[9] In *Michigan Gaming Institute,* the petitioner applied to the respondents for a license to operate a school to teach prospective gambling employees. Then appellate Judge, now Justice, Corrigan concluded in her dissent that the application should be denied because the school would be teaching behavior that violates provisions of the Penal Code. However, the dissenting opinion, adopted by the Supreme Court, expressly noted that public opinion regarding casino gambling was "in flux" and that Michigan did not choose to allow casino gambling on Indian reservations, but was required to negotiate with the tribes by virtue of the IGRA. Plaintiffs' contention that this opinion supports their position is without merit. Rather, the forecast of change in the context of casino gambling was realized as shown by the MGCRA.

communities. Const. 1963, art. 4, § 29. We disagree. This state has no authority to regulate conduct on Indian tribal lands. Thus, while cities surrounding the designated casino areas may be affected, the IGRA has provided that Indian tribes may operate casinos on tribal lands. The citizens of the state of Michigan cannot vote on the propriety of placing tribal casinos on tribal lands. Thus, this argument is without merit. Accordingly, we reverse the trial court's conclusion that the approval of the compacts by way of resolution violates Const. 1963, art. 4, § 22 and Const. 1963, art. 3, § 2, and affirm the trial court's conclusion that the approval did not violate Const. 1963, art. 4, § 29, albeit on other grounds.[10]

Affirmed in part and reversed in part. We do not retain jurisdiction.

---

[10] Although procedural challenges were raised regarding plaintiffs' standing and regarding real party in interest based on the failure to add the Indian tribes to the litigation, we have addressed the merits of the appeal because the issue was one of recurring public significance that was not definitively resolved by *McCartney, supra,* and *Tiger Stadium Fan Club, supra.* See *Camden v. Kaufman,* 240 Mich.App. 389, 393, 613 N.W.2d 335 (2000).

STATE OF MICHIGAN
IN THE INGHAM COUNTY CIRCUIT COURT
GENERAL TRIAL DIVISION

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, a Florida corporation, and GAMING ENTERTAINMENT (Michigan), LLC, A Delaware limited liability company,

Intervening Defendants.

OPINION AND ORDER
Hon. Peter D. Houk
Docket No.:
99-90195-CZ

This Court, having considered Cross Motions for Summary Disposition from all of the parties and the briefs in support thereof, and having heard oral arguments on December 3, 1999, issues the following Opinion and Order.

OPINION

INTRODUCTION

> The Legislature is the final arbiter of this state's public policy. The quintessential political judgment whether to alter the quality of our collective life in Michigan by legalizing casino gambling should occur in the political branch.[1]

Casino gambling is a highly regulated activity that has been considered a moral evil by the citizens of the State of Michigan for decades.[2] While it is not this Court's place to pass judgment on this public policy; this case involves just that – an issue of public policy. As such, it is for the people of this State, via their representatives in the Michigan Legislature, to determine the State's policy regarding gambling. Therefore, when the Legislature changes its longstanding policy regarding casino-style gambling, it must do so through the enactment of legislation and all of the procedures pertaining thereto.

FACTS

Plaintiffs in this case seek declaratory judgment that House Concurrent Resolution 115 (hereafter HCR 115) is

---

[1] *Michigan Gaming Institute, Inc v. State Bd of Education*, 211 Mich App 514, 522; 536 NW2d 289 (1995) (Corrigan, J., dissenting), rev'd 451 Mich 899; 547 NW2d 882 (1996).

[2] One must look no further than the City of Detroit to see that casino-style gambling is an issue of controversy in Michigan. Between 1976 and 1994, Detroit voters rejected five proposals to bring casinos into the city. It was not until 1996 that the voters finally approved Proposal E to allow casinos to open their doors. House Legislative Analysis, HB 4664, June 11, 1997.

violative of the Michigan Constitution. Four Indian tribes[3] located within the State of Michigan petitioned the State, as required by federal statute[4], to run casino-style gambling facilities on Indian lands. Governor Engler negotiated these compacts on behalf of the State of Michigan.[5] The compacts permit the Indian tribes to operate the gaming facilities, subject to many requirements including following certain State labor and liquor laws, requiring that a percentage of the revenues be paid to the State, and defining who may lawfully gamble at these facilities. These compacts also require the approval of the State Legislature by resolution before they become effective. The State Legislature approved these compacts through HCR 115, which passed in both Houses in December, 1998, by narrow margins.[6]

Plaintiffs bring this three-count complaint alleging that HCR 115 violates the Michigan Constitution because it is in fact "legislation" that was passed without approval of a majority of the members elected and serving in the House and Senate. Plaintiffs also allege that this resolution violates the Separation of Powers Clause contained in

---

[3] The compacts are between the State of Michigan and the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi Indians.

[4] The Federal Indian Gaming Regulatory Act (IGRA) permits casino-style gambling on Indian lands only if the tribe has entered into a valid State/Tribe compact approved by the State. 25 USC 2710(d)(1)(C).

[5] These four compacts contain identical terms and will be discussed together throughout this Opinion.

[6] 1998 Journal of the Senate 76 (December 11, 1998).

the Michigan Constitution because it grants to the executive branch law-making powers.

ANALYSIS

All of the parties, including the Intervening Defendants, have brought Motions for Summary Disposition. Defendant, State of Michigan, contends that Plaintiffs have failed to state a claim upon which relief can be granted. Plaintiffs bring their Motion arguing that there is no genuine issue of material fact and that Plaintiffs are entitled to judgment as a matter of law. Lastly, the Intervening Defendants bring a Motion for Summary Disposition claiming that the complaint fails to state a claim upon which relief can be granted, that Representative Baird should be dismissed for lack of standing, and that the complaint should be dismissed for Plaintiff's failure to join indispensable parties – the four Indian tribes. The Defendant, State of Michigan, and the Intervening Defendants will collectively be referred to as "Defendants" throughout this Opinion and Order.

I. Standards of Review

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. *Maiden* v *Rozwood*, 461 Mich 109; 597 NW2d 817 (1999).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. The reviewing court should evaluate a motion under (C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules. *Maiden, supra.*

II. Resolution v Bill

Counts I alleges that approval of these compacts should have been through legislation, and not resolution. Therefore, it is alleged that article IV, § 22 of the Michigan Constitution has been violated. Article IV, § 22 provides that all legislation shall be by bill and may originate in either House. Plaintiffs contend that the compacts make policy decisions for the State and could only be passed by the Legislature after being presented as a bill.

Defendants respond that the compacts are nothing more than contracts between the State and the Indian tribes and as such, do not need to be enacted as a new law. Defendants claim that the compacts are not binding on the State, outside of the Legislature, where the rules established in the compacts are nothing more than agreements between the parties. Defendants argue that these agreements are not subject to enforcement by the State, other than a claim of breach of contract. Defendants also contend

that the resolution is not contrary to public policy where Michigan has legalized many forms of gambling in the State and passed the Michigan Gaming Act, being MCL 432.201; MSA ___.

The issue here is whether the compacts are legislation as opposed to contracts entered into by the State of Michigan. If the compacts are legislation, then the Michigan Constitution has been violated where the compacts were approved only through resolution because approval by resolution does not require the same process and vote approval as a bill. If the compacts are contracts, and not legislation, then approval by resolution was appropriate.[7]

This issue is one of first impression in Michigan. The only on-point Michigan authority available is an Opinion of Attorney General, Frank J. Kelley, in which the Attorney General opines that State/Tribe gaming compacts are legislation.[8] The Attorney General first noted in his opinion that although the Federal Indian Gaming Regulatory Act (IGRA)[9] requires states to negotiate in good faith with Indian tribes for the establishment of the compacts,

---

[7] Unlike the federal constitution, the Michigan Constitution is not a grant of authority to the Michigan Legislature, but rather a limitation. *In re Request for Advisory Opinion Enrolled Senate Bill* 558, 400 Mich 175; 254 NW2d 544 (1977). If the Michigan Constitution does not prohibit an act, it is permitted. Therefore, the Michigan Legislature has a general power to contract for the State of Michigan unless there is a limitation contained in the constitution. *Id.* There is no statute that limits the Legislature's authority to enter into compacts with Indian Tribes or any process required to enter into such compacts. Therefore, the only applicable constitutional limitation is the process required for the passage of a bill.

[8] OAG, 1997, No. 6960, p 159, (October 21, 1997).

[9] 25 USC 2701 *et seq.*

the Act is silent as to what process must be followed.[10] This silence has been interpreted as Congress' intent that it is State law that determines what process is required for the entering into the compacts.[11] The Attorney General then concluded that these compacts are legislation. He made this finding based upon the fact that Indian casinos would be in violation of State law without the compacts and because the compacts establish numerous requirements that must be met with regards to the operation of the casinos. These requirements would be binding upon the State and have the same force and effect of law, and therefore, are legislation.[12]

Plaintiffs also advocate that two other states, New Mexico and Kansas, have considered this issue and have concluded that the State/Tribe compacts are legislation. See *State v Johnson*, 120 NM 562; 904 P2d 11 (NM, 1995);

---

[10] 25 USC 2701(d)(3)(A).

[11] *Pueblo of Santa Ana v Kelly*, 104 F3d 1546 (CA 10, 1997).

[12] The Attorney General, in reaching this conclusion, relied on the case of *Becker v Detroit Savings Bank*, 269 Mich 432, 434-435; 257 NW 853 (1934) (holding that a resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.") This principle was reiterated in the case of *Blank v Dep't of Corrections*, 222 Mich App 385; 564 NW2d 130 (1997), where the Court of Appeals struck down a provision in the Michigan Administrative Procedures Act, MCL 24.201 *et seq*; MSA 3.560(101) *et seq*, that gave the Joint Committee on Administrative Rules the authority to veto administrative rules. The Court of Appeals relied, in part, on the holding of the Alaska Supreme Court that the legislature may act by resolution only in an advisory capacity, "but, when it [the Legislature] means to take action having the binding effect on those outside the legislature it may do so only by following the enactment procedures." *Id.* at 394 (Citing *State v ALIVE Voluntary*, 606 P2d 769, 773 (Alas. 1980)).

State v Finney, 251 Kan 559; 836 P2d 1169 (Kan, 1992). These two cases, while instructive dealt with the broader issue of whether the governor of a state could independently enter into a compact, rather than the issue of whether the compact constituted legislation. Both states, however, did find that the compacts at issue were new laws, and as such, could only be enacted by the state legislature. Both the New Mexico and Kansas compacts had requirements similar to those established in the compacts at issue. For example, the Kansas compact required the establishment of a state gaming agency and permitted the state government to run background investigations on employees of casinos. The New Mexico compact authorized forms of gambling that were illegal in that state. The Supreme Court for each state ultimately concluded that based on those factors, the compacts were policy choices that constituted new laws or the amendment of existing laws, thus were legislative functions.

Defendants cite the case of *Pueblo of Santa Ana v Kelly*, 104 F3d 1546, 1556 (CA 10, 1997), which stated that "[a] compact is a form of a contract." Defendants contend that this case supports their proposition that the compacts at issue are nothing more than contracts that could be ratified through resolution. This case is clearly distinguishable, however, where the issue of whether the compacts were legislation was never addressed.

Defendants contend that the Michigan Court of Appeals has also discussed the issue of the constitutionality of the Governor negotiating a State/Tribe compact and reached the same conclusion as in the *Kelly* case. *See Tiger Stadium Fan Club, Inc. v Governor*, 217 Mich App 439, n 5; 553 NW2d 7 (1996). In *Tiger Stadium*, the Court of Appeals held that revenues received from Indian casinos

as a part of a consent judgment between the Governor and an Indian tribe was not State money, thus not subject to the appropriations clause. Defendants contend that the *Tiger Stadium* Court implicitly held that approving State/Tribe compacts by resolution was appropriate where the Court stated that the Governor did not violate the Separation of Powers Clause by signing the consent judgment and only receiving legislative approval by resolution. The Court of Appeals again discussed this issue in the case of *McCartney* v *Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998). The *McCartney* court held that the Governor had the authority to negotiate State/Tribe compacts so long as he presented the compacts to the Legislature for approval.

There are two critical factors that must be noted about the *Tiger Stadium* and *McCartney* cases. First, neither of these cases involved the issue of whether the compacts constituted legislation, and thus, the statements pertaining this issue are dicta. *Tiger Stadium* involved a claim that money received by the State pursuant to a consent judgment signed by the Governor was subject to the appropriations clause. *McCartney* involved a Michigan Freedom of Information claim where the plaintiff sought documents from the Governor relating to the Governor's negotiations with Indian tribes to enter into compacts. Neither case involved a challenge to the means by which the Legislature approved by compacts entered into by the Governor and Indian tribes for casino gambling.

Second, and most importantly, the *Tiger Stadium* and *McCartney* cases discussed, albeit in dicta, whether the Governor has the authority to negotiate compacts with the Indian tribes and then present the compacts to the Legislature for approval. These cases did not discuss whether

the content of the compacts was such that the compacts constituted legislation.[13] In fact, as pointed out by the *McCartney* court, "The Governor is constitutionally authorized to present and recommend legislation." *McCartney* at 726 (Citing Const 1963, art 5, § 17). This quote indicates that the Court merely analyzed the issue of whether the Governor had the authority to negotiate the compacts, and left the issue of the process for legislative approval for another day.

Based on the Opinion of the Attorney General and the decisions of the State of Kansas and New Mexico, as well as Michigan and federal law regarding what actions the Legislature may take by resolution versus bill, the Court finds that HCR 115 is legislation.[14] As stated by the United States Supreme Court in the case of *INS* v *Chadha*, 462 US 919, 952; 103 S Ct 2764; 77 L Ed 2d 317 (1983), to determine whether an action is legislative in nature, one must look not to the form, "but upon 'whether they contain matter which is properly to be regarded legislative in its character and effect.'" Therefore, the Court must look

---

[13] The compacts at issue in *Tiger Stadium* were also passed by concurrent resolution (HCR 439). 1992 Journal of the Senate 2479. This resolution passed in the Senate by a vote of 23 to 13. *Id.* The resolution also passed in the House, but the roll-call was not recorded in the House Journal. To this Court's knowledge, this Legislative act was not challenged with legal action. It is interesting to note, however, that the Sentatorial vote did constitute a majority vote of those elected and serving in the Senate, unlike the resolution at issue in the case at bar.

[14] Defendant contends that the Opinion of the Attorney General should not be heeded as it is not binding precedent on this Court. The Court recognizes the Opinion of the Attorney General is not binding. While not binding, an opinion of the Attorney General can be persuasive authority. *Indenbaum v Michigan Bd of Medicine*, 213 Mich App 263; 539 NW2d 574 (1995).

beyond the "contract" form of the compact and consider its substance.

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice. . . . " *Rodriguez* v *US*, 480 US 522, 526; 107 S Ct 1391; 94 L Ed 2d 533 (1987). There are several aspects of the compacts that have the hallmarks of legislation. Perhaps the most remarkable provision that the State has approved, via the compacts, is that a person of the age of 18 may lawfully engage in casino style-gambling, an act generally prohibited by Michigan law. Section 18 of the Michigan Gaming Control and Revenue Act, being MCL 432.201 *et seq*; MSA ___, makes it a misdemeanor for a person under the age of 21 to engage in casino-style gambling. This act excludes from its application gambling on Indian territory. Section 3(2)(d). However, the Court finds instructive that the Legislature has previously made similar policy decisions, e.g. age of a person who may lawfully engage in casino gambling, through Legislation.

Defendants contend that law-making was not required in this case because regulation of Indian gaming has been pre-empted by federal law. *See California* v *Cabazon Band of Mission Indians*, 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987). The *Cabazon* Court also noted, however, that a state, under certain circumstances, may limit the activities of nonmembers on a reservation. 480 US at 215 (Citing *New Mexico* v *Mescalero Apache Tribe*, 462 US 324, 331-332; 103 S Ct 2378, 2385; 76 LE 2d 611 (1983)). In determining whether the state may regulate the activities of nonmembers, the Court considered "whether state authority is pre-empted by the operation of federal law; and '[s]tate jurisdiction is pre-empted . . . if it

interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.'" 480 US at 216.

IGRA provides that:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of *criminal law and public policy*, prohibit such gaming activity. [25 USC 2701(5).] [Emphasis added.]

Thus, IGRA does not pre-empt all State authority over gaming on Indian lands. The age restriction found in the Michigan Gaming Control and Revenue Act is a primary example of Michigan's public policy against persons under the age of 21 being permitted to engage in casino-style gambling.

Defendants contend, however, that since the Michigan Gaming Control and Revenue Act expressly permits casino-style gambling, the State has no authority to regulate any casino gambling on Indian land. This Court disagrees. The State of Michigan does not permit casino-style gambling for persons under the age of 21. This is not a regulation of casino gambling in Michigan, but rather a prohibition of this type of gambling for persons under a certain age. This is a policy decision made by the citizens of the State of Michigan that it does not want its' youth influenced by this addictive activity.[15] Therefore, where the

---

[15] The National Gambling Impact Study Commission has warned that lawmakers should take a careful look at the social costs of

(Continued on following page)

Legislature enters a joint resolution permitting a person under the age of 21 to engage in casino gambling on Indian reservations, an activity normally considered criminal under Michigan law, the Legislature is acting on behalf of the citizens in determining the public policy of the State of Michigan. This policy affects all of the citizenry, and thus, may not be passed through resolution, but must be enacted as legislation.

In addition to the age requirement, the compacts also provide for an extensive State regulatory scheme over the casinos. The State, for example, has the right to inspect the casino records and bookkeeping (section 4(M)) and perform background checks on casino employees (section 4(L)). Additionally, section 18(A)(ii) states that the local governments "shall" create a local revenue sharing board to receive and disburse a portion of casino revenues paid to the local governments. Contrary to the State's contention that these local sharing boards are not mandated by the compact and that the local governments are mere third party beneficiaries, the plain language of the compact mandates the establishment of these boards. If this Court were to interpreted this provision as a statutory provision, which it is, the Court would be restricted to the clear and unambiguous meaning; that the local governments "shall"

---

gambling before increasing its State gaming. Peter Szekely, *Nation is Urged to Halt Spread of Legal Gambling*. DETROIT FREE PRESS, June 19, 1999. The City of Detroit offers a prime example of gambling's major social cost – addiction. In the past five years, the number of Gamblers Anonymous groups in Detroit has more than tripled. Additionally, there were no certified gambling counselors in Michigan in 1995. Wendy Wendland, *Chronic Gambling Increases in Detroit*, DETROIT FREE PRESS, December 7, 1999. Today, the Director of the Michigan Council on Problem Gambling states that there are more than 200 counselors across the State. *Id.*

establish the local sharing boards – not that they "may" establish the boards. *McKenzie* v *Auto Club Insurance Association*, 458 Mich 214, 217; 580 NW2d 424 (1998) (Citing *Tryc* v *Michigan Veterans' Facility*, 451 Mich 129, 135-136, 545 NW2d 642 (1996).

III. Local Acts

Plaintiffs' next argument is that the compacts are local acts because each compact only allows the construction of casinos in a designated county or counties. Therefore, the Legislature must pass the compacts, in the form of a bill, by a two-thirds vote of the House and Senate and a majority vote of the electorate affected. Defendants respond that since the compacts are not legislation, this constitutional provision does not apply.

Mich Const 1963, art IV, § 29 provides:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. Any act repealing local or special acts shall require only a majority of the members elected to and serving in each house and shall not require submission to the electors of such district.

Article IV, § 29 only applies where the Legislature has passed a local act *and where a general act could be made applicable.* Plaintiffs have not argued that a general act

could be made applicable. Therefore, this claim is dismissed for lack of merit.

IV. Separation of Powers

Plaintiffs also contend that these compacts violate the Separation of Powers Clause[16] because the Governor has acted to usurp legislative law-making power. The Separation of Powers Clause provides that no person exercising the powers of one branch may exercise the powers of another *House Speaker* v *Governor*, 443 Mich 560, 586; 506 NW2d 190 (1993). The compacts entered into permit the Governor to amend these compacts without any legislative approval, and thus, the Governor has been given law-making authority pursuant to the terms of the compacts.[17] This clause unconstitutionally grants the Executive branch legislative authority in violation of the Michigan Constitution.

V. Standing – Representative Baird

The Intervening Defendants contend that Representative Baird lacks standing as a Legislator to bring this claim because she has not suffered an injury and/or she has not suffered an injury distinct from the citizenry at large. This claim is without merit, however, where the Michigan Supreme Court held in the case of *House*

---

[16] Const 1963, art 3, § 2.

[17] The Court notes that it does not make a finding that the Governor may not negotiate a compact and then recommend legislation, undisputedly the Governor has the constitutional authority to do so. Const 1963, art 4, § 17. The Governor does not have the authority, however, to enter into legislation which permits the Governor to unilaterally amend the legislation.

Speaker, supra, that where two of the parties in that case had standing to sue such that the court could adjudicate the claims before it, the court need not address the issue of whether the Senator-plaintiff had standing. *House Speaker* at 573. Therefore, based on *House Speaker*, this Court need not address this issue because the standing of the non-profit corporation has not been challenged.

VI. Failure to Join Indispensable Parties

The Intervening Defendants also request that this complaint be dismissed for Plaintiffs' failure to join indispensable parties – the four Indian tribes who are parties to the "contract". MCR 2.205 provides that "necessary parties" must be joined in a lawsuit. A necessary party is a person who has such an interest in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief. MCR 2.205(A). There are four factors to be considered before the court makes a determination to continue without a necessary party:

> (1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;
>
> (2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;
>
> (3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and
>
> (4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment.

The Intervening Defendants contend that since the compacts are a contract, Plaintiffs cannot bring this claim without suing both parties to the contract – the State and the four Indians tribes. And, since the Indians have sovereign immunity and are not subject to suit in state court, this action must be dismissed. *See Huron Potawatomi, Inc.* v *Stinger*, 227 Mich App 127; 574 NW2d 706 (1997) (holding that suits against Indian tribes are barred by sovereign immunity absent a clear and unequivocal waiver by the tribe).

Plaintiffs respond that the tribes are not a necessary party where Plaintiffs seek no relief from the tribes and where any interest the tribes have has been preserved by the Intervening Defendants. Plaintiffs point out that just because a person may have an interest in a case, that does not mean that they must necessarily by joined. Furthermore, this same issue was raised in *State* v *Johnson, supra*, and the New Mexico Supreme Court held that the Indians tribes need not be joined where the claim was not for breach of contract and did not require the court to adjudicate the rights and obligations of the parties to the compact.

The question is whether the court can provide complete relief without joining the party. *Hoffman* v *Auto Club Ins Ass'n*, 211 Mich App 55; 535 NW2d 529 (1995). This case is a request for declaratory judgment. The Plaintiffs have asked this Court to determine that the Governor of the State of Michigan doe snot have the authority to enter into Tribal-State compacts with Indian tribes without Legislative approval. Therefore, the Court can provide complete relief. The Indian tribes are not a necessary party because the rights and obligations sought to be declared are with regards to legislative and gubernatorial

authority, not with respect to the compact itself. To the extent that the Indian tribes are a necessary party, however, their interests are protected by the Intervening Defendants. Thus, any prejudice to the Indian tribes is greatly lessened. Moreover, Plaintiffs do not have an adequate remedy at law against the Indian tribes since they are entitled to sovereign immunity.

ORDER

IT IS ORDERED that Plaintiffs' Motion for Summary Disposition is hereby **GRANTED IN PART** and the Michigan Legislature and the Governor have violated Const 1963, art 4, § 22 and Const 1963, art 3, § 2 by approving legislation through means of joint resolution and permitting the Governor to unilaterally amend the legislation.

IT IS FURTHER ORDERED that Defendants' Motion for Summary Disposition is hereby **GRANTED IN PART** and the Michigan Legislature has not violated Const 1963, art 4, § 29.

This case is dismissed in its entirety.

Dated: January 18th, 2000 /s/ Peter D. Houk
Hon. Peter D. Houk
Circuit Court Judge

PROOF OF SERVICE

I certify that I mailed a true copy of the above **OPINION AND ORDER** upon all attorneys of record or parties by placing said copy in the first class mail with postage prepaid from Mason, Michigan, on January 18, 2000.

/s/ Ann M. Baird
Ann M. Baird
Judicial Assistant

cc: Robert J. Jonker
Eugene Driker
Peter H. Ellsworth
Robert M. Horwitz

(2)

Supreme Court, U.S.
FILED
DEC 29 2004
OFFICE OF THE CLERK

No. 04-581

In The Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,

Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT GAMING ENTERTAINMENT, LLC'S, BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD D. MCLELLAN*
R. LANCE BOLDREY
KRISTINE N. TUMA
DYKEMA GOSSETT PLLC
124 W. Allegan Street
Suite 800
Lansing, MI 48933
(517) 374-9111
Counsel for Respondent Gaming Entertainment, LLC

**Counsel of Record*

December 29, 2004

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESTATEMENT OF QUESTION PRESENTED

The following restatement of the question presented in this case more accurately reflects the absence of a federal issue in Petitioner's Petition for a Writ of Certiorari:

Under the Michigan Constitution of 1963, was the Michigan Legislature required to enact legislation rather than act by concurrent resolution in binding the State of Michigan to a tribal-state gaming compact?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are Petitioner, Taxpayers of Michigan Against Casinos, and Respondents State of Michigan and Gaming Entertainment (Michigan), LLC. Respondent North American Sports Management Company, Inc., IV, was dismissed from this case by the Michigan Court of Appeals on August 12, 2002, and is no longer a party to this proceeding. (Court of Appeals Order, App. at 1).

Pursuant to Rule 29.6, Gaming Entertainment (Michigan), LLC, states that it is wholly owned by Full House Resorts, Inc. Full House Resorts, Inc., is publicly traded over the counter under the symbol FHRI OB.

TABLE OF CONTENTS

	Page
RESTATEMENT OF QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	4
STATEMENT OF THE CASE	5
I. Factual History	5
II. Procedural History	7
ARGUMENT	10
I. The Decision Of The Michigan Supreme Court Does Not Raise A Federal Question	10
II. There Is No Conflict Regarding An Important Federal Question Between The Michigan Supreme Court's Decision And Decisions Of Other State Supreme Courts Or United States Courts Of Appeals	14
III. Contrary To Tomac's Arguments, The Compacts Are Not Authorized Pursuant To The Interstate Compact Clause, And Present No Issue Of National Significance	22

TABLE OF CONTENTS – Continued

Page

IV. The Michigan Supreme Court's Decision Was Correct And Should Not Be Disturbed By This Court 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Am. Greyhound Racing, Inc. v. Hull, 146 F. Supp. 2d 1012 (D. Ariz. 2001), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002) 10, 18

Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004) 20

Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) 23

Cuyler v. Adams, 449 U.S. 433 (1981) 25

Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996) 21

Gregory v. Ashcroft, 501 U.S. 452 (1991) 10

Illinois v. Gates, 462 U.S. 213 (1983) 2

Immigration & Naturalization Serv. v. Chada, 462 U.S. 919 (1983) 12, 28

Keweenaw Bay Indian Community v. United States, 136 F.3d 469 (6th Cir. 1998) 10, 12

Pataki v. Saratoga County Chamber of Commerce, Inc., 124 S. Ct. 570 (2003) 16

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997) 10

Seminole Tribe of Fla. v. Florida, 11 F.3d 1016 (11th Cir. 1994) 23

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 22

United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170 (10th Cir. 1991) 27

TABLE OF AUTHORITIES – Continued

Page

United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) 25

United States v. Cook, 922 F.2d 1026 (2d Cir. 1991) 26

United States v. EC Invs., Inc., 77 F.3d 327 (9th Cir. 1996) 26

United States v. Mandel, 415 F. Supp. 1025 (D.C. Md. 1976) 10

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 25

Yakus v. United States, 321 U.S. 414 (1944) 12

STATE CASES

Attorney Gen. v. Montgomery, 267 N.W. 550 (Mich. 1936) 28

In re Brewster Street Housing Site, 289 N.W. 493 (Mich. 1939) 28

Confederated Tribes of the Chehalis Reservation v. Johnson, 958 P.2d 260 (Wash. 1998) 19

Narragansett Indian Tribe of R.I. v. Rhode Island, 667 A.2d 280 (R.I. 1995) 11, 17

Panzer v. Doyle, 680 N.W.2d 666 (Wis. 2004) 11, 16

Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047 (N.Y. 2003) 11, 15, 16

State ex rel. Clark v. Johnson, 904 P.2d 11 (N.M. 1995) 11, 16, 17

State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) 11, 17, 18

Young v. City of Ann Arbor, 255 N.W. 579 (Mich. 1934) 28

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

18 U.S.C. § 1166 ..... *passim*
18 U.S.C. § 1166(c)(2) 21, 27
18 U.S.C. §§ 1166-1168 4
25 U.S.C. § 2703(8) 5
25 U.S.C. § 2710(d) 4, 26
25 U.S.C. § 2710(d)(1) 5, 6
25 U.S.C. § 2710(d)(3)(A) 6, 16
25 U.S.C. § 2710(d)(3)(C) 6, 27
25 U.S.C. §§ 2701-2721 4
28 U.S.C. § 1257(a) 1, 2, 14

FEDERAL CONSTITUTIONAL PROVISIONS

U.S. CONST., art. I, § 8, cl. 3 ..... 22, 23
U.S. CONST., art. I, § 10, cl. 3 22
U.S. CONST., amend. X 10

STATE CONSTITUTIONAL PROVISIONS

MICH. CONST., art. IV, § 22 2
MICH. CONST., art. IV, § 29 9

SUPREME COURT RULES

Supreme Court Rule 10(b) 14
Supreme Court Rule 14(1)(f) 4
Supreme Court Rule 14(1)(g)(i) 2

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Gaming Entertainment, LLC, respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari in this case.

JURISDICTION

Petitioner asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), which provides the Court with the power to review:

> [F]inal judgments or decrees rendered by the highest court of a state . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States. 28 U.S.C. § 1257(a).

As explained *infra*, however, this case does not call into question the validity of any treaty or statute of the United States, or of a statute of the State of Michigan, on grounds that it violates the United States Constitution or federal law. Nor does this case involve any title, right, privilege, or immunity set up or claimed under federal authority. Rather, this case involves the validity of an action taken by the Michigan Legislature tested in accordance with the *Michigan* Constitution of 1963. Specifically, the case asks whether, pursuant to the Michigan Constitution, the Legislature should have enacted a statute in approving

tribal-state gaming compacts, instead of acting by concurrent resolution. Since no question encompassed by 28 U.S.C. § 1257(a) is presented by this case, this Court lacks jurisdiction.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The central constitutional provision at issue in this case is Article IV, Section 22 of the Michigan Constitution of 1963, which states simply: "All legislation shall be by bill and may originate in either house." MICH. CONST., art. IV, § 22.

In its statement of the constitutional and statutory provisions involved in this case, Petitioner cites only subsection (a) of 18 U.S.C. § 1166. That full statutory section reads as follows:

[1] Amplifying the lack of a federal question in this case is Petitioner's failure to comply with Supreme Court Rule 14(1)(g)(i), which requires Petitioner in its Statement of the Case to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts," and to quote portions of the record with specific references "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." S. Ct. R. 14(1)(g)(i). Petitioner's failure to comply with this rule is not surprising, given that the case at bar is and always has been one of state law. The question presented by Petitioner was not one "pressed or passed upon below," and was discussed by the Michigan Supreme Court only in *dicta*. *See Illinois v. Gates*, 462 U.S. 213 (1983) (noting that if a claim was "not pressed or passed upon below," this Court should decline to hear that claim). This Court should not grant the Petition on these tenuous grounds.

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of

criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Finally, tribal-state gaming compacts are a creature of 25 U.S.C. § 2710(d), which due to its length is not reproduced here but is included in the Appendix at App. 30-38. S. Ct. R. 14(1)(f).

INTRODUCTION

This case presents no question regarding either the validity of any federal statute or the federal constitutionality of any state act. Instead, this case presents only issues regarding the manner in which the Legislature of the State of Michigan approved tribal-state compacts negotiated between Indian tribes and the Governor of Michigan pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168. As IGRA and the case law interpreting IGRA make clear, and as the Michigan Supreme Court recognized in its July 30, 2004, Opinion ("Opinion") (Opinion, Petition App. at 1-110), these issues are resolved pursuant to the Constitution and laws of the State of Michigan, and do not implicate any federal question over which this Court has jurisdiction. Throughout its October 28, 2004, *Petition for a Writ of Certiorari* ("Petition"), Petitioner Taxpayers of Michigan Against Casinos ("TOMAC") struggles to identify an important question of federal law that was decided by the Michigan Supreme Court in a way that conflicts with decisions of other state courts of last resort or of a United States Court of Appeals. Ultimately, TOMAC cannot do so. Moreover, TOMAC also cannot demonstrate any error in the Michigan Supreme Court's Opinion. Consequently, this Court should deny TOMAC's Petition.

STATEMENT OF THE CASE

I. Factual History.

This case concerns the constitutionality, pursuant to the *Michigan* Constitution, of the Michigan Legislature's method of concurrence in four Indian gaming compacts (the "Compacts") negotiated between and signed by then-Governor John Engler and four Indian tribes (collectively, the "Tribes"),[2] and approved by the Michigan Legislature by concurrent resolution in 1998. It is undisputed that the Tribes and the State of Michigan (the "State") negotiated and entered into the Compacts according to the requirements of IGRA. The Compacts represent the agreement between the State and the Tribes regarding the manner in which the Tribes will conduct Class III gaming (casino-style gaming) on their lands. 25 U.S.C. § 2703(8).

Pursuant to IGRA, Class III gaming activities are lawful on Indian lands if the gaming activities are: (1) properly authorized by the Indian tribe; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."[3] 25 U.S.C. § 2710(d)(1). It

---

[2] These tribes are the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi Indians. Two of these tribes have been operating gaming facilities since 1999, employing hundreds of people and contributing many millions of dollars to the local and state economies. (Opinion, Petition App. at 7 n.2).

[3] There is no dispute in this case that the tribes have properly authorized gaming or that the State of Michigan permits casino gaming. As Justice Kelly noted, the voters of the State of Michigan have authorized commercial casinos, the State operates a lottery offering a

(Continued on following page)

is through the compacting process that a tribe and a state may choose to extend some or all of the state's regulatory authority to grant the state jurisdiction to regulate tribal gaming activities. 25 U.S.C. § 2710(d)(3)(C). IGRA does not specify, however, the manner in which the State enters into a tribal-state compact. 25 U.S.C. § 2710(d)(3)(A) (requiring only that states "negotiate with [an] Indian tribe in good faith to enter into such a compact" if a tribe seeks to engage in Class III gaming).

In 1993, the Michigan Legislature, acting by concurrent resolution, bound the State of Michigan to gaming compacts with seven tribes, all of which are currently operating casinos. (Opinion, Petition App. at 66-68). Then, in 1997, the terms of the four Compacts at issue in this case were negotiated between the Tribes and Governor Engler. After changes were made to the Compacts in reaction to concerns raised by the Michigan Legislature, the Legislature approved the Compacts and bound the State to them via House Concurrent Resolution 115 ("HCR 115"). HCR 115 was passed by the Michigan House of Representatives on December 10, 1998, and by the Michigan Senate on December 11, 1998. HCR 115 received a majority of the votes of the legislators present and voting in each chamber, meeting the necessary threshold established by rules of each house of the Legislature for approval of a concurrent resolution.[4] (Opinion, Petition App. at 7 n.4).

---

wide range of games, and the State allows pari-mutuel wagering on horse races. (Opinion, Petition App. at 34). The only aspect of 25 U.S.C. § 2710(d)(1) implicated by this case is the compact requirement.

[4] TOMAC's claim that HCR 115 was originally "defeated" in the House is inaccurate. (Petition at 5). TOMAC cites to no official record

(Continued on following page)

II. Procedural History.

TOMAC filed this action against the State on June 10, 1999, challenging the validity of HCR 115 and the Compacts as a matter of *state* constitutional law.[5] Specifically, TOMAC raised the following issues:

> (1) whether HCR 115 constituted "legislation" and therefore violated Mich. Const. 1963, art. 4, § 22, which requires that all legislation be passed by bill;
>
> (2) whether a provision in the Compacts regarding their amendment violated Mich. Const. 1963, art. 3, § 2, which establishes the separation of powers between the branches of government; and
>
> (3) whether HCR 115 constituted a local act in violation of Mich. Const. 1963, art. 4, § 29, which limits the use of local acts and contains certain voting requirements for such acts. (Opinion, Petition App. at 3).

After the trial court opined that the manner of approval of the Compacts violated the Michigan Constitution, the Michigan Court of Appeals reversed that decision and held that the Michigan Legislature's actions were constitutional. The Michigan Supreme Court accepted

---

demonstrating defeat of HCR 115 – because no such record exists. In fact, the only recorded vote in the House was one of approval. (Opinion, Petition App. at 7 n.4). Furthermore, while it is true that the number of affirmative votes that HCR 115 actually received in the House of Representatives would not have been sufficient to pass a bill, it is pure supposition to claim that additional votes could not have been garnered had approval of the Compacts proceeded by enactment of a bill.

[5] Gaming Entertainment, LLC, ("GE") intervened as a party defendant pursuant to an order dated September 20, 1999. GE has a contractual agreement with the Nottawaseppi Huron Band of Potawatomi Indians, and has provided financial and other support in that tribe's efforts to open and operate a casino on its tribal lands.

TOMAC's application for leave to appeal. After oral argument, a 5-2 majority of the Michigan Supreme Court affirmed the decision of the Michigan Court of Appeals, ruling in favor of the State and GE.

The principal issue decided by the Michigan Supreme Court in this case was whether HCR 115 actually constituted "legislation" as that term is used in the Michigan Constitution. In deciding this question, the Michigan Supreme Court explored the meaning of the term "legislation" as a matter of Michigan constitutional law, ultimately concluding that a hallmark of "legislation" is that the Legislature is engaged in "unilateral regulation" (Opinion, Petition App. at 9-10), exercising a "power to speak on any subject *without any specified limitations.*" (Opinion of Justice Kelly, Petition App. at 38, emphasis in original, citations omitted). The Michigan Supreme Court then concluded, *inter alia*, that the plenary power of the United States Congress over Indian affairs and the compacting clause of IGRA, which requires the consent of the tribes to a gaming compact, deny the Michigan Legislature the degree of unilateral authority that under the Michigan Constitution would make its assent to the gaming compacts "legislation."[6] (Opinion, Petition App. at 9-19). The Michigan Supreme Court further found that 18 U.S.C. § 1166, which would make tribal gaming in the absence of a compact illegal under federal law if not conducted in conformity with "borrowed" state law,[7] did not provide the

---

[6] The Michigan Supreme Court instead found that the Compacts are contractual in nature and held that the Michigan Legislature could exercise its inherent power to bind the State to a contract by passing a resolution. (Opinion, Petition App. at 15-22).

[7] TOMAC incorrectly asserts that "absent the compacts, the permitted gambling would be a crime under Michigan law." (Petition at 4). Rather, such activities would be prohibited by *federal* law, as the

(Continued on following page)

Michigan Legislature the scope of power and authority that might require that the Compacts be entered into through "legislation." (Opinion, Petition App. at 10-15). After analyzing both the meaning of the term "legislation" under state law, and the specific provisions of the Compacts, the Michigan Supreme Court ultimately determined that HCR 115 and the Compacts are *not* legislation requiring passage by bill.[8] (Opinion, Petition App. at 26).

State of Michigan lacks any authority to prosecute Indian gaming violations. 18 U.S.C. § 1166.

[8] The Michigan Supreme Court also found that the Compacts are not local acts under the Michigan Constitution, which are subject to different procedures and voting requirements than other bills. MICH. CONST., art. IV, § 29. The Michigan Supreme Court remanded to the Michigan Court of Appeals the issue of "whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine" in the Michigan Constitution. (Opinion, Petition App. at 26). In its Brief and Reply Brief filed with the Michigan Court of Appeals on remand, TOMAC argues that, under the Michigan Supreme Court's Opinion, the compacting power is held by the Legislature and cannot be delegated, and further argues that the initial Compacts as a whole must be invalidated on other state constitutional grounds involving the Legislature's appropriations power. (TOMAC Court of Appeals Brief, Excerpted at App. at 8-21). Although the Michigan Court of Appeals granted GE's Motion to Strike TOMAC's latest challenge to the compacts as a whole (GE Motion to Strike, App. at 22-28; Court of Appeals December 9, 2004, Order, App. at 29), TOMAC may, of course, appeal this decision. TOMAC's attempt to continue to litigate the validity of the Compacts in the remand thus threatens the finality of the Michigan Supreme Court's Opinion. TOMAC's arguments also contradict its contention in the Petition that Justice Markman's dissenting opinion correctly concluded that the Michigan Supreme Court's decision transformed the matter of tribal-state compacting "into the exclusive province of a single public official, the Governor." (Petition at 9). While it is possible that at some point a federal question may arise from the continued litigation of this case in the Michigan courts, it is clear that no federal question has yet been presented by any party or passed upon by the Michigan courts.

ARGUMENT

I. The Decision Of The Michigan Supreme Court Does Not Raise A Federal Question.

In its Petition, TOMAC attempts to manufacture a federal question where none exists and where it never asserted one before. While IGRA is a federal statute, and the Michigan Supreme Court discussed sections of IGRA, including 18 U.S.C. § 1166, in its Opinion, the central issue in this case is the manner in which the State of Michigan enters into an IGRA compact – an issue that the Michigan Supreme Court correctly held is resolved not by IGRA itself, but by state constitutional principles. (Opinion, Petition App. at 19-22). As various federal courts have correctly recognized: "IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997); *see also Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 477 (6th Cir. 1998) (noting that the manner of state approval of a compact is "dependent on relevant state laws"); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001) (evaluating the validity of tribal-state compacts based on principles of state constitutional law), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002) (finding that the tribes were indispensable parties to the case). Congress did not, and could not, dictate to the states the manner in which they were to enter into compacts with Indian tribes. U.S. CONST. amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (noting that each state has the sole "constitutional responsibility for the establishment and operation of its own government") (citations omitted); *see also United*

States v. Mandel, 415 F. Supp. 1025, 1031 (D.C. Md. 1976) (noting that "the states under our federal scheme have, within broad constitutional limits, the exclusive power to allocate the functions of the executive, judicial, and legislative powers as they wish").

In fact, in its previous submissions in this case, TOMAC itself has repeatedly acknowledged that the issue presented in this case is one of state law. In its Brief on Appeal filed with the Michigan Supreme Court, TOMAC claimed that the Michigan Court of Appeals "incorrectly held that federal law determines the manner in which a state approves compacts," and *correctly* asserted that instead "state law determines the proper process for approval of a compact." (TOMAC Mich. Supreme Court Brief, Excerpted at App. at 3). The point on which the parties to this case have differed is the *manner* in which *Michigan law* requires that the Compacts be approved. The issue has always been, and remains, one of state, not federal, law.

The Michigan Supreme Court's recognition that the primary issue in this case is one of state law is in accordance with the decisions of courts in other states, which also have found that questions regarding the manner in which a state enters into a compact with a tribe should be decided based on state, not federal, law. *See Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003); *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I. 1995); *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995); *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992). As Justice Markman noted in his partial concurrence and partial dissent in this case, the United States Court of Appeals for the Sixth

Circuit also has recognized that the manner in which a state binds itself to a tribal-state gaming compact is determined by reference to state law. (Opinion, Petition App. at 67 n.34). In *Keweenaw Bay Indian Community v. United States*, 136 F.3d at 477, the Sixth Circuit discussed the Michigan tribal-state compacts entered into in 1993 (and approved by the same legislative process utilized for the Compacts at issue here), and stated: "[A] governor's endorsement of a compact as required by the terms of a compact is coincidental, varied and dependent on the relevant *state laws*." (emphasis added).

Recognizing these principles, and in accordance with numerous other decisions on this point, the Michigan Supreme Court correctly concluded that the question presented by this case is a question of *state* constitutional law. (Opinion, Petition App. at 19-22). After thoroughly analyzing the Michigan Constitution, Michigan cases construing the meaning of the term "legislation" in the Michigan Constitution, and the specific terms of the Compacts, the Supreme Court found that the Michigan Constitution does not require the Michigan Legislature to enact a bill in order to approve gaming compacts with Indian tribes.[9] (Opinion, Petition App. at 9-22). Since the

[9] Although the Michigan Supreme Court did look to some federal law principles in reaching its conclusions regarding the definition of "legislation" under the Michigan Constitution (Petition at 7; Opinion, Petition App. at 24 (citing *Yakus v. United States*, 321 U.S. 414, 424 (1944))), the Court did not rely upon federal law in making this determination, and the federal cases examined by the Court are not controlling. Even though the Michigan Supreme Court reviewed the Compacts against the principles set forth in *Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919 (1983), it did so only in response to the dissent and to demonstrate that, even if the test set forth in *Chada* were to be applied in determining whether the Compacts constitute

(Continued on following page)

question of the manner in which the Michigan Legislature assents to the Compacts is one of *state* constitutional law, the Michigan Supreme Court is and should be the final arbiter of this question.

The federal issue TOMAC attempts to create in its Petition is actually the Michigan Supreme Court's state constitutional analysis of the effect of the degree to which the State has jurisdiction and power over tribal gaming (which speaks to the state constitutional question of whether the power of the Michigan Legislature exercised in concurring in the Compacts was the Legislature's power of enacting "legislation" or another legislative power, the power to contract). In its Opinion, the Michigan Supreme Court properly characterized the balance of power between the State and the federal government with respect to the regulation of Indian gaming, and used this characterization as one of a number of reasons for finding that the Michigan Legislature did not enact "legislation" when it approved the Compacts. (Opinion, Petition App. at 10-15). Fundamentally, however, this case presents only questions

---

legislation, "the factors do not demonstrate that the Legislature's approval of the compacts was an act of legislation." (Opinion, Petition App. at 23; Petition at 13 & n.1). Even dissenting Justice Markman agreed that the central consideration in this case is "which state actor has the power to bind the state to a legislative compact and according to which procedures *under state law*." (Opinion, Petition App. at 97). Ultimately, it is the Michigan Supreme Court's decision in this case (and prior state cases) that stands as the final word on the meaning of the term "legislation" in Michigan's Constitution. Even if the Michigan Supreme Court's views regarding decisions of this Court defining "legislation" were flatly wrong (which they are not), that would not transform this fundamental question of state constitutional law into an issue reviewable by this Court.

of state constitutional law. No federal question encompassed by 28 U.S.C. § 1257(a) exists and this Court, therefore, should deny TOMAC's Petition.

II. There Is No Conflict Regarding An Important Federal Question Between The Michigan Supreme Court's Decision And Decisions Of Other State Supreme Courts Or United States Courts Of Appeals.

Beyond claiming simply that the Michigan Supreme Court's decision presents an issue of federal law, TOMAC attempts to satisfy the requirements of Supreme Court Rule 10(b), asserting that the Michigan Supreme Court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." S. Ct. R. 10(b). (Petition at 11). Specifically, TOMAC claims that "the Michigan Supreme Court's decision furthers a conflict among state supreme courts and creates a conflict with the Ninth Circuit Court of Appeals regarding the balance of State and Tribal power under IGRA." (Petition at 11). No such conflict actually exists, however. None of the state court cases relied upon by TOMAC addressed the federal issue TOMAC attempts to manufacture concerning 18 U.S.C. § 1166 – indeed, only one of those cases even mentioned this statute, and did so only in passing. Rather, each of the cases cited by TOMAC dealt with issues of state law relative to the manner in which those states entered into tribal-state gaming compacts under IGRA. Each court analyzed issues unique to each state's own constitution and involving distinct sets of facts, and no conflicting position with respect to any issue of federal law exists.

In fact, all of the cases cited by TOMAC explored the extent of the Governor's authority under each state's laws and constitutions, and *none* of these cases addressed whether a legislative resolution, rather than a bill, is a sufficient means of legislative action to bind a state to an Indian gaming compact. (Petition at 11-13). TOMAC does not identify any true split of authority in its Petition – because it cannot. Instead, the cases cited by TOMAC stand for the following propositions, none of which conflict with the findings of the Michigan Supreme Court in this case:

- In *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003), the Governor of New York approved an Indian gaming compact without obtaining legislative approval in *any* form. The Court of Appeals of New York held that the Governor violated the separation of powers doctrine *of the New York State Constitution* by signing the compacts without legislative authorization or approval. *Id.* at 1059-60. The court carefully reviewed the specific provisions of the compact at issue, which, among other things, vested oversight of gaming operations in a state agency and assigned specific enforcement duties to the state police, and determined that the gaming compacts were "laden with policy choices" that required legislative approval. *Id.* at 1060-62. These compacts thus are fundamentally different from the Compacts at issue in this case, which, as the Michigan Supreme Court recognized, contain no provisions creating new state agencies or new state duties. (Opinion, Petition App. at 18). Moreover, the *Pataki* Court correctly held that "IGRA does not preempt state law governing which state actors are competent to negotiate and agree to gaming compacts. IGRA imposes on 'the State' an obligation to negotiate in good

faith (25 U.S.C. § 2710(d)(3)(a)), but identifies no particular state actor who shall negotiate the compacts; that question is left up to state law."[10] *Id.* at 1060. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), the Wisconsin Supreme Court held that a state statute authorizing the Governor to enter into Indian gaming compacts on behalf of the state was valid, but that the Governor did not have authority, *under the Wisconsin Constitution*, to bind the state to terms in the compact that permitted the tribe to offer games that were otherwise prohibited by state law and waived state sovereign immunity.[11] While the court found that, *under Wisconsin law*, the Governor "does not possess unilateral authority to reach binding compacts with tribes on behalf of the state," the court also correctly recognized that other states "may allocate power among the branches in a manner different from Wisconsin," and thus might properly reach different results on this issue. *Id.* at 687-88. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), the Governor of New Mexico approved Indian gaming compacts without obtaining legislative approval in

---

[10] This Court denied certiorari to review this case on November 17, 2003. *Pataki v. Saratoga County Chamber of Commerce, Inc.*, 124 S. Ct. 570; 157 L. Ed. 2d 430 (2003) (No. 03-392).

[11] The Compacts at issue here contain no such terms.

any form. The Supreme Court of New Mexico held that the Governor did not have authority, *under the New Mexico Constitution* to bind the state to Indian gaming compacts without legislative approval. The court noted that IGRA "authorizes state officials, acting pursuant to their authority *under state law*, to enter into gaming compacts on behalf of the state," and found that "the Governor lacked authority *under New Mexico law* to enter into the compact." *Id.* at 26 (emphasis added). 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I. 1995), the Supreme Court of Rhode Island found that the Governor of Rhode Island lacked authority, *under the Constitution and laws of Rhode Island*, to bind the state to an Indian gaming compact without any involvement of the Rhode Island Legislature. Tellingly, the court heard and decided this issue as a certified question from the federal district court, in which litigation was pending regarding that tribal-state compact. *Id.* at 280. The question certified to the Rhode Island court was: "Whether, *under Rhode Island law*, the Governor had authority to act on behalf of and to bind the 'State' by executing [the tribal-state compact]." *Id.* (emphasis added). The court answered this question in the negative, based on Rhode Island's "particular state constitutional history and judicial interpretation." *Id.* at 282. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992), the Governor of Kansas negotiated and

signed a tribal-state compact without obtaining *any* type of approval from the Kansas Legislature. The compact contained provisions creating a State Gaming Agency to monitor the tribal gaming operation and to conduct investigations, requiring the Kansas Bureau of Investigation to perform background investigations on prospective gaming employees, and requiring tribal law enforcement to be trained by the state.[12] The Kansas court held that these provisions required legislative action, and that the Governor had no power, *under the Constitution and laws of Kansas*, to bind the state to the compact. *Id.* at 1181-85. The court also recognized that IGRA "is silent relative to who or what group negotiates [a tribal-state compact] on behalf of the State." *Id.* at 1179. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• Finally, in *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001), a decision that was ultimately vacated by the Ninth Circuit on different grounds, 305 F.3d 1015 (9th Cir. 2002), the Arizona federal district court found, among other things, that "[t]he Governor's duty to negotiate compacts and the terms to which she may agree are set out in state law. State law questions about whether a state has validly bound itself to a gaming compact are not preempted [by IGRA]." 142 F. Supp. 2d at 1052. The court then went on to note that, *under Arizona law*, the Governor had overstepped state constitutional bounds in negotiating the compacts. *Id.* at 1069-72. 18 U.S.C. § 1166 was not relevant to the court's

[12] The Compacts at issue here contain no such terms.

determination of this state law case and indeed was mentioned only in passing.

Simply stated, none of the state cases cited by TOMAC present *any* conflict with the Michigan Supreme Court's Opinion in this case or any "split of authority" with respect to an issue of federal law. Each of these cases was decided based on specific provisions included in the compact or compacts at issue, and based on applicable *state* constitutional and statutory provisions governing the powers and responsibilities of the branches of state government. None of these cases decided an important question of federal law or established any "authority" for any principle of federal law, and none are "authority" concerning the Michigan Supreme Court's analysis of Michigan constitutional terms and principles. Moreover, none of these cases even addressed the specific issue presented by this case: Whether the state legislature, under the state's constitution, may bind the state to a compact by resolution, instead of by bill. No conflict exists between these cases, and these cases do not present any important question of federal law.[13] To the extent that the cases address a common issue at all, it is the following:

---

[13] These cases also do not conflict with the decision in *Confederated Tribes of the Chehalis Reservation v. Johnson*, 958 P.2d 260 (Wash. 1998), in which the Washington Supreme Court found, in a case related to the public disclosure of records showing the payments made by tribes to defray certain community costs associated with the operation of tribal gaming facilities, that the Indian gaming compacts are agreements, "not legislation," and are interpreted as contracts. *Id.* at 267. As in the other cases cited by TOMAC, this case was decided pursuant to *state* law.

> What body of law determines the manner in which a state binds itself to a tribal-state gaming compact required under IGRA?

In response to this question, every court cited by TOMAC reaches the same answer as did the Michigan Supreme Court and the federal courts that have addressed this issue: "the substantive law of each *state*."

Finally, the Michigan Supreme Court's Opinion also does not conflict, as TOMAC contends, with the Ninth Circuit's decision in *Artichoke Joe's Cal. Grand Casino v. Norton* ("*Artichoke Joe's*"), 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004). (Petition at 13-14). In *Artichoke Joe's*, the Ninth Circuit addressed the issue of whether California's constitution, which essentially provided a tribal monopoly within the state for certain forms of gaming, (1) violated IGRA, or (2) violated California card clubs' and charities' rights to equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[14] *Id.* In deciding that California's constitutional scheme and tribal-state gaming compacts complied with IGRA and comported with equal protection guarantees, the Ninth Circuit discussed 18 U.S.C. § 1166 and the manner in which it affects the balance of power between the states and the federal government in the regulation of tribal gaming. *Id.* at 721-22. As part of this discussion, the court noted that, *if no tribal-state gaming compact is in place*, a state "may enact laws and regulations concerning gambling *that have an effect* on Indian lands via § 1166," but that will be *enforced*

[14] Neither of these issues is presented in Michigan, where, as noted by Justice Kelly, the State has authorized full-scale commercial casino operations for non-Indians. (Opinion, Petition App. at 34).

by the federal government. *Id.* at 722 (emphasis added). Where a compact is in place, however, 18 U.S.C. § 1166 *by its express terms* does not apply to gaming conducted pursuant to that compact, and the state may regulate that gaming only as provided in the compact negotiated with the tribe. *See* 18 U.S.C. § 1166(c)(2).

Accordingly, the Michigan Supreme Court was entirely correct in stating that "[t]he only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact." (Opinion, Petition App. at 13). *See also Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 545-47 (8th Cir. 1996) (similarly stating that "Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact"). Indeed, a state can *directly* regulate tribal gaming *only* if the tribe consents to such regulation as part of its compact with the state. No actual conflict exists, then, between the statements in *Artichoke Joe's* and the statements in the Michigan Supreme Court's Opinion and the opinion in *Gaming Corp. of America*.

Moreover, the issue before the Michigan Supreme Court had nothing to do with whether 18 U.S.C. § 1166 permits state laws to have an *effect* on Indian gaming, but rather dealt with whether the State has power, authority, and jurisdiction of a nature that requires the Michigan Legislature to approve tribal-state gaming compacts by legislation, under Michigan constitutional law.[15] The

[15] Contrary to TOMAC's assertion, the Michigan Supreme Court's Opinion does not in any way render 18 U.S.C. § 1166 a "nullity."
(Continued on following page)

Michigan Supreme Court's conclusion that legislation is not required to approve a compact does *nothing* to the provisions of IGRA and, as a state law question, does not merit review by this Court.

III. Contrary To Tomac's Arguments, The Compacts Are Not Authorized Pursuant To The Interstate Compact Clause, And Present No Issue Of National Significance.

After unsuccessfully attempting to manufacture a federal question and pointing to a nonexistent conflict between the opinions of state courts, TOMAC baldly asserts that tribal gaming compacts were authorized by Congress "through IGRA under the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, the same provision that allows Congress to sanction interstate compacts," (Petition at 15), and that compacts are of such great national interest that this Court should resolve disputes over whether a state complied with its own Constitution and laws in entering into them. (Petition at 15-17). TOMAC's reliance on the Interstate Compact Clause of the United States Constitution is completely misplaced, however, and it therefore is not surprising that TOMAC is unable to cite *any* authority to support its view.

As this Court stated in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996), IGRA "was passed by Congress under the Indian Commerce Clause," U.S. CONST., art. I, § 8, cl. 3. In fact, in the lower court decision in that same case, the Eleventh Circuit rejected the

---

(Petition at 15). In the absence of a binding compact, 18 U.S.C. § 1166 continues to borrow state law as federal law with respect to gaming.

argument that IGRA compacts were authorized under the Interstate Commerce Clause and held that "Congress enacted IGRA *solely* under the Indian Commerce Clause." *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1026 (11th Cir. 1994) (emphasis added) (finding that "[t]he Supreme Court's jurisprudence on the Indian Commerce Clause bolsters our conclusion that Congress enacted IGRA solely under that authority") (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.")), *aff'd*, 517 U.S. 44.

The Indian Commerce Clause provides: "The Congress shall have Power . . . To regulate commerce with . . . the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3. Although it appears in the same text within the United States Constitution as the Interstate Commerce Clause, this Court has found the Indian Commerce Clause to be a distinct provision with "very different applications." *Cotton Petroleum Corp.*, 490 U.S. at 192. The Indian Commerce Clause is similarly distinct from the Interstate Compact Clause, and TOMAC can point to no authority suggesting otherwise. As neither IGRA nor the tribal-state compacts negotiated pursuant to IGRA arise under the Interstate Compact Clause, TOMAC fails in its attempt to establish that Interstate Compact Clause jurisprudence supports a grant of certiorari in this case.[16]

---

[16] Nor does TOMAC succeed in its assertions that tribal-state gaming compacts themselves present an issue of broad national significance. TOMAC's arguments against gaming based on "socioeconomic considerations" are clearly one-sided and biased, and are irrelevant to the question of whether this Court should grant TOMAC's

(Continued on following page)

Furthermore, TOMAC's Interstate Compact Clause arguments are utterly at odds with TOMAC's arguments below. In its Brief on Appeal filed with the Michigan Supreme Court, TOMAC correctly argued that the Interstate Compact Clause is *inapplicable* to this case. (TOMAC Mich. Supreme Court Brief, Excerpted at App. at 5-7). TOMAC there stated: "No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs." (TOMAC Mich. Supreme Court Brief, Excerpted at App. at 6). Moreover, TOMAC also correctly noted that this Court has recognized that the Interstate Compact Clause applies, and congressional approval of agreements between states or between states and foreign powers "is only required[,] for agreements that tend to encroach upon or interfere with the supremacy of the United States."

Petition. (Petition at 17-19). This case presents no issue of "great national importance" concerning Indian gaming or the regulation of Indian gaming. (Petition at 17). Questions regarding the scope of gaming, the classification of various games, or the appropriate balance of enforcement authority are simply not presented here. Contrary to TOMAC's claim, the Michigan Supreme Court's Opinion does not leave Indian gaming "essentially unregulated," but instead properly recognizes the State's role in regulating gaming – either through federal application of State law for gaming not governed by a compact, or through whatever regulatory balance is agreed upon between the State and the Tribe in a compact. (Petition at 19). Although the Michigan Supreme Court properly construed federal law in reaching its decision, the primary holding of its decision had nothing to do with federal law, instead deciding *pursuant to Michigan Constitutional law* the question of the manner in which the State binds itself to an Indian gaming compact. No matter how hard TOMAC now strains to claim otherwise, this case has always focused on the narrow issue of whether the State of Michigan, pursuant to its own Constitution and laws, properly bound itself to gaming compacts with Michigan Tribes. That issue of state law presents no issue worthy of review by this Court.

(TOMAC Mich. Supreme Court Brief, Excerpted at App. at 6 n.22 (citing *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981))). Since the Compacts at issue here do not interfere with federal supremacy, TOMAC's Interstate Compact Clause argument is misplaced.

Even if the Interstate Compact Clause could potentially be applied to the Compacts at issue here (which it cannot), the cases cited by TOMAC still do not counsel in favor of this Court reviewing the decision of the Michigan Supreme Court. As TOMAC notes in its Petition, this Court has recognized that it should review state courts' determinations of state law with respect to compacts only "in the limited field where a compact brings in issue the rights of other States and the United States." (Petition at 16 (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951))). This case, however, presents no issue regarding the interplay between the rights of the State and the rights of other states, or between the rights of the State and the federal government. While IGRA, which delineates the regulatory functions of the states and the federal government with respect to tribal gaming, provides a backdrop for this case, the actual issues presented by the case are merely questions of state law that have been determined correctly by the Michigan Supreme Court. This Court should decline to review that decision.

IV. The Michigan Supreme Court's Decision Was Correct And Should Not Be Disturbed By This Court.

In its Petition, TOMAC argues that IGRA ensures state regulatory and policy-making power over Indian gaming both through 18 U.S.C. § 1166, which TOMAC

argues provides the states with the power to regulate Indian gaming that is not conducted pursuant to a compact, and through 25 U.S.C. § 2710(d), which provides *inter alia* that Class III gaming may be conducted on Indian lands only pursuant to the terms of a tribal-state compact. (Petition at 21-23). TOMAC then argues that, since federal law grants the states regulatory power over Indian gaming, and since the Compacts at issue here "set forth an extensive regulatory framework governing tribal gaming activities," the Michigan Supreme Court erred in finding that federal law does not delegate regulatory power to the states of a nature such that, under Michigan's Constitution, the Compacts must be approved by the Legislature by bill (instead of by resolution). (Petition at 7-10, 21-25). TOMAC's argument, however, fails on several grounds.

First, TOMAC continues to fail to acknowledge that, while 18 U.S.C. § 1166 makes state law applicable to gaming on Indian lands in the absence of a compact, it does not give a state enforcement power over violations of state gaming laws on Indian lands. *See United States v. EC Invs., Inc.*, 77 F.3d 327, 330-31 (9th Cir. 1996) (finding that because 18 U.S.C. § 1166 "effectively grants the federal government exclusive jurisdiction over California's gambling laws regarding Class III gaming conducted on Indian lands without a Tribal-State compact, California lacks the jurisdiction to prosecute a violation" of its state law on an Indian reservation); *see also United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991) (cited by TOMAC, yet involving a *federal*, not state, prosecution for gaming violations). Instead, 18 U.S.C. § 1166 "incorporates state laws as the *federal* law governing all nonconforming gambling in Indian country," and provides that "the power

to enforce these newly incorporated laws rests *solely* with the United States." *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991) (emphasis added). The Michigan Supreme Court correctly recognized these principles in its Opinion. (Opinion, Petition App. at 14-15).

When a state and a tribe enter into a compact for Class III gaming, 18 U.S.C. § 1166 by its own terms *no longer applies* to gambling activities conducted pursuant to the terms of the compact. *See* 18 U.S.C. § 1166(c)(2) (stating that gambling for purposes of this section does not include Class III gaming conducted pursuant to a compact that is in effect). Instead, a state's criminal and civil laws apply to gaming activity conducted pursuant to a compact only as agreed upon by the compacting parties. 25 U.S.C. § 2710(d)(3)(C). Although TOMAC asserts that "an appropriate compact *will* apply state regulatory law to Indian gaming," (Petition at 22, emphasis added), the application of state law is not in fact required, and takes place only upon the election of both the state and the tribe. 25 U.S.C. § 2710(d)(3)(C). IGRA gives states a regulatory enforcement role with respect to tribal gaming *only* where a tribe cedes such jurisdiction through a compact. *Id.* In the Compacts at issue in this case, the parties did not agree to extend state regulations or jurisdiction over tribal gaming. (Opinion, Petition App. at 18).

Given that the Compacts here cede no regulatory authority to the State, the Michigan Supreme Court correctly decided that, under provisions of the *Michigan* Constitution, the Michigan Legislature lacked unilateral regulatory power over tribal gaming and the Legislature's approval of the compacts was not "legislation." In its Petition, TOMAC argues that the Compacts "change

Michigan gaming laws that apply to specific Indian lands" by providing standards for the hiring of casino employees, the types of games that may be played and by whom, recordkeeping and reporting requirements, and other standards. (Petition at 3-4; 13 n.1; 23-24).[17] As the

[17] TOMAC argues that these sections of the Compacts "impact State public policy, create new rules and obligations that bind those outside the legislature, and replace the existing state laws and regulations with the terms of the compacts themselves." (Petition at 3). These statements not only are incorrect on their face, but they also appear to be based upon the four-factor test articulated in *Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919 (1983), in which this Court set forth the factors to be analyzed in determining whether Congress, upon delegating authority to an executive agency, could retain the right to approve or disapprove actions of that agency. In its Opinion in this case, however, the Michigan Supreme Court specifically found that the *Chada* test does not apply to the Michigan constitutional determination of whether the Compacts constitute legislation requiring legislative approval by bill. (Opinion, Petition App. at 22-23). Even if this test is applied, however, the court found that "the factors do not demonstrate that the Legislature's approval of the compacts was an act of legislation." (Opinion, Petition App. at 23-26). Instead of relying upon federal law to define the meaning of the term "legislation" in the Michigan Constitution, the Michigan Supreme Court properly looked to state law to define legislation as "unilateral regulation," and found that the Compacts were more properly described as contracts, and not legislation. (Opinion, Petition App. at 9-10). The Michigan Supreme Court also found that it was appropriate for the Court to defer to the discretion of the Legislature in approving the Compacts by resolution since "[u]nlike the federal constitution, [the Michigan] Constitution 'is not a grant of power to the legislature, but is a limitation upon its powers.' *In re Brewster Street Housing Site*, 291 Mich. 313, 333; 289 N.W. 493[, 500] (1939). Therefore, 'the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.' *Attorney Gen. v. Montgomery*, 275 Mich. 504, 538; 267 N.W. 550[, 563] (1936)" (Opinion, Petition App. at 19). *See also Young v. City of Ann Arbor*, 255 N.W. 579, 581 (Mich. 1934) (stating that the state "legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the Parliament of England, subject only to the Constitution of the

(Continued on following page)

Michigan Supreme Court held, however, the compacts "only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities. Under the terms of the compacts, the tribes themselves, not the state, regulate the conduct of class III gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts." (Opinion, Petition App. at 16-17).

Moreover, the Michigan Supreme Court also correctly found that any restrictions imposed by the Compacts with respect to the operation of gaming activities "are not restrictions on the citizens of Michigan; rather, they are restrictions only on the *tribes*. The compacts provide the minimum requirements that the *tribes* agree to use in hiring and admitting guests to the casinos. The state has no power to regulate the casinos or enforce violations of the compact, but must use the dispute resolution procedure provided in the compacts if a violation occurs." (Opinion, Petition App. at 17-18). Unlike the compacts at issue in other cases cited by TOMAC, these Compacts do not create any new state agencies,[18] authorize additional forms of gaming not already permitted within the State, or

---

United States and the restraints and limitations imposed by the people upon such power by the Constitution of the state itself).

[18] While TOMAC continues to assert that the Compacts obligate local units of government to create local revenue sharing boards to accept tribal payments (Petition at 24 n.7), the Michigan Supreme Court correctly found that this provision of the Compacts also does not constitute state regulation, as the affected local units of government are merely third-party beneficiaries to the Compacts and cannot be contractually bound to do *anything* by a contract to which they are not parties. (Opinion, Petition App. at 17).

permit the State to exercise other regulatory authority over tribal gaming operations.[19] Accordingly, the Michigan Supreme Court's analysis of the Compacts was correct, and this Court should decline to review that analysis.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD D. MCLELLAN*
R. LANCE BOLDREY
KRISTINE N. TUMA
DYKEMA GOSSETT PLLC
124 W. Allegan Street
Suite 800
Lansing, MI 48933
(517) 374-9111
Counsel for Respondent
Gaming Entertainment, LLC

**Counsel of Record*

December 29, 2004

[19] *See* Part II, *infra*.

Court of Appeals, State of Michigan

ORDER

Taxpayers of Michigan v State of Michigan	Harold Hood Presiding Judge
Docket No. 225017	Donald E. Holbrook, Jr.
LC No. 99-090195-CZ	Donald S. Owens, Judges

The Court orders that the motion to dismiss one of the intervening parties (NORAM) and to withdraw as counsel is GRANTED.

/s/ Harold Hood
Presiding Judge

[LOGO] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 12 2002
Date

/s/ Sandra Schultz Mengel
Chief Clerk

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals (Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,

Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees. /

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL – APPELLANT

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

Submitted by:

Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Norbert F. Kugele (P47084)
Daniel K. DeWitt (P51756)

Warner Norcross & Judd LLP
111 Lyon Street, N.W., Suite 900
Grand Rapids MI 49503-2487
(616) 752-2000

Attorneys for Appellants

* * *

B. The Court of Appeals erred in deciding that federal law rather than state law determines the manner in which IGRA compacts are approved.

The Court of Appeals also incorrectly held that federal law determines the manner in which a state approves compacts. Specifically, the court erred in ruling that (1) IGRA expressly authorizes the State legislature to approve a compact by concurrent resolution, and (2) the federal Compact Clause authorizes approval by concurrent resolution. To the contrary, state law determines the proper process for approval of a compact and requires that the compacts be approved as legislation.

1. State constitutional law determines how states enter into compacts.

State law not only sets gambling policy, it also determines how a state can validly "enter into" and bind itself to a gambling compact under IGRA. The question of whether state or federal law determines the manner in which a compact is approved was squarely addressed in *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1557-1558 (CA

10, 1997). *Pueblo of Santa Ana* involved a declaratory action brought by Indian tribes from the State of New Mexico for a determination that certain compacts approved by the Secretary of the Interior pursuant to IGRA were valid even though the governor of the State of New Mexico lacked authority to enter into the compacts. *Id.* at 1548. The Tenth Circuit determined that a compact, even if approved by the Secretary of the Interior, is invalid unless it is first properly approved by a state. *Id.* at 1555. The court then applied U.S. Supreme Court precedent to conclude that in the absence of specific guidance in IGRA, *state law* would determine the proper procedure for executing valid compacts. *Id.* at 1557-1558.

The California Supreme Court recently agreed: "[for a compact] [t]o be 'entered into' [under IGRA] by the state and the tribe means to be 'entered into' validly in accordance with state (and tribal) law." *Hotel Employees,* 21 Cal 4th at 612; *accord, Saratoga County Chamber of Commerce, Inc v Pataki*, 712 NYS2d 687, 696; 275 AD2d 145 (NY App Div, 2000) (ruling that state law determines whether a state has validly bound itself to a compact); *see also New Mexico v Johnson,* 120 NM at 578 (ruling that the United States Congress cannot expand the authority of a state or its officials over and above the authority granted by a state's constitution).

2. IGRA does not determine how a compact is approved.

The Court of Appeals erroneously interpreted IGRA as expressly authorizing a state's approval of a compact by resolution. Ct of Appeals Op at 12-13 (App at 133a-134a). This is a simple misreading of the statute. *See* 25 USC

2710(d). While IGRA specifies that the *Indian tribe* may approve a compact by resolution, *see* 25 USC 2710(d)(1)(A), it is silent as to how a state must approve of the compact, *see* 25 USC 2710(d)(1)(C). Even Appellee, the State of Michigan, admits: "IGRA does not specify what is required for a state to validly bind itself to a compact. It has been held that the issue is determined by state law. *See Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1557 (CA 10 1997)." (State of Michigan's Brief in Opposition to Application for Leave to Appeal at 5 n 3.) *See also Saratoga County*, 2003 NY LEXIS 1470, *33 (ruling that IGRA leaves to state law who will negotiate and agree to a compact).

3. The federal Compact Clause is also inapplicable.

In ruling that concurrent resolution was an appropriate method of approving these compacts, the Court of Appeals also relied heavily upon cases interpreting the federal Compact Clause to conclude that approval by bill was unnecessary. Citing *United States Steel Corp v Multistate Tax Comm'n*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), the court noted, "The approval by resolution contained in the IGRA is consistent with federal law addressing compacts. Congressional approval was generally one of historic occurrence rather than necessity. The true test of congressional approval occurs when powers of an entity are usurped." Ct of Appeals Op at 13 (App at 134a). While the federal Compact Clause may address the question of whether and how the U.S. Congress must

approve a compact, it does *not* address the way in which a *state* must *enter into* a compact.[22]

The *Multistate Tax Commission* opinion verifies that the federal Compact Clause is inapplicable here. The case involved the issue of whether a compact between states, establishing a Multistate Tax Commission, required approval by the United States Congress. *Multistate Tax Comm'n,* 434 US at 454. The Supreme Court concluded that Congressional approval was not required because the compact did not impermissibly encroach upon federal supremacy. *Id.* at 472-473. What was not in dispute, and what the Court *did not address,* was the mechanism by which the states had entered into the compact. In fact, each state that had entered into the compact, including Michigan, had done so by way of legislation. *Id.* at 454 n 1; *see also* MCL 205.581.

No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs. *See, e.g., Pueblo of Santa Ana,* 104 F3d at 1557-1558. Under Michigan law, the appropriate test for determining whether the compacts

---

[22] The federal Compact Clause provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . . " US Const, art I, § 10, cl 3. A literal reading of the clause would require the states to obtain congressional approval of some form before entering into any agreement among themselves. The U.S. Supreme Court, however, has eschewed such an approach and held that congressional approval of a compact is only required for agreements that tend to encroach upon or interfere with the supremacy of the United States. *See Multistate Tax Comm'n,* 434 US at 471, *Cuyler v Adams,* 449 US 433, 440; 101 S Ct 703; 66 L Ed 2d 641 (1981).

constitute legislation, requiring approval as a bill, is set forth in *Blank*. The Court of Appeals' reliance upon *Multistate Tax Commission*, instead of *Blank*, is clear error.

* * *

STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiff/Appellees/ Cross-Appellants,

v.

STATE OF MICHIGAN,

Defendant/Appellant/ Cross-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, a Florida corporation, GAMING ENTERTAINMENT (Michigan), LLC, a Delaware limited liability company, and LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS,

Intervening Defendants/ Appellants/Cross-Appellees. /

Court of Appeals No. 225017

Ingham County Circuit Court Case No. 99-90195-CZ

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING COMPACT AMENDMENT

ORAL ARGUMENT REQUESTED

Riyaz A. Kanji (P60296)
Jennifer B. Salvatore (P66640)
KANJI & KATZEN, P.L.L.C.
201 South Main Street,
Suite 1000
Ann Arbor, Michigan 48104
(734) 769-5400
Counsel for Little Traverse Bay Bands of Odawa Indians

Janes Bransky (P38713)
General Counsel
7500 Odawa Circle
Harbor Springs, Michigan
49740
(231) 946-5241
Counsel for Little Traverse Bay Bands of Odawa Indians

Eugene Driker (P12959)
Thomas F. Cavalier (P34683)
BARRIS, SOTT, DENN &
DRIKER, P.L.L.C.
211 West Fort Street,
15th Floor
Detroit, Michigan 48226
(313) 965-9725
Special Assistant Attorneys General for Defendant/ Appellant State of Michigan

Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Daniel K. DeWitt (P51756)
John J. Borsch (P57679)
WARNER NORCROSS
& JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan
49503-2487
(616) 752-2000
Counsel for Taxpayers of Michigan Against Casinos

Richard D. McLellan (P17503)
R. Lance Boldrey (P53671)
DYKEMA GOSSETT, PLLC
124 West Allegan Street,
Suite 800
Lansing, Michigan 48933
(517) 374-9111
Counsel for Gaming Entertainment, LLC

Jeffery V. Stuckey (P34648)
DICKINSON WRIGHT, PLLC
215 South Washington
Square, Suite 200
Lansing, Michigan 48933
(517) 487-4766
Counsel for North American Sports Management Company, Inc.

* * *

BASIS OF JURISDICTION

This Court has jurisdiction by virtue of the Michigan Supreme Court's remand in its decision of July 30, 2004,

Taxpayers of Michigan Against Casinos v State, 471 Mich 306; 685 NW2d 221 (2004) [hereinafter, "*TOMAC*"]. This Supplemental Brief Addressing Compact Amendment is submitted pursuant to this Court's Order of October 8, 2004.

STATEMENT OF QUESTIONS PRESENTED

1. Does the amendment provision in the tribal-state gaming compacts, which purports to empower the Governor to amend the compacts unilaterally, violate the separation of powers clause, Const 1963, art 3, § 2, thereby voiding the amendment provision?

The Trial Court said: Yes.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

2. Does the Governor's Amendment to the tribal-state compact with the Little Traverse Band of Odawa Indians appropriate state funds without a legislative enactment is violation of the separation of powers clause, Const 1963, art 3, § 2?

The Trial Court did not address this issue.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

3. Does the Supreme Court's holding that the tribal-state compacts are valid contracts, and

therefore neither a legislative enactment (as TOMAC had urged) nor an instrument of gratuitous transfer (as this Court held in *Tiger Stadium*), mean that the original terms of the tribal-state compacts appropriate state funds without a legislative enactment in violation of the separation of powers clause, Const 1963, art 3, § 2?

The Trial Court did not address this issue.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

4. If the original or amended payment term of a tribal-state compact is both constitutionally invalid and non-severable, is the underlying amendment or compact void in its entirety?

The Trial Court did not address this issue.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

INTRODUCTION

This proceeding arises out of the Governor's unilateral decision in July 2003 to create a new casino within the State of Michigan, and to appropriate, in her sole discretion, the revenue-sharing payments attributed to both the new and an existing casino. The Michigan Legislature purported to delegate this sweeping amendment power to

the Governor when it approved a resolution ratifying the underlying compact and three others like it.

In an Opinion dated July 30, 2004, the Michigan Supreme Court held that the underlying compacts were valid contracts, and therefore neither legislation subject to the presentation and enactment requirements of the Michigan Constitution (as TOMAC had urged) nor an instrument of gratuitous transfer (as this Court held in *Tiger Stadium*). The Supreme Court stopped short of analyzing the significance of its holding for the validity of the amendment power granted to the Governor in the compacts, and remanded the case to this Court for a ruling, in the first instance, on these questions.

The broad and virtually unconstrained power to amend that the Legislature purportedly delegated to the Governor violates the Michigan Constitution's strict separation of powers. The Legislature may not delegate its power to the executive without adequate constraints imposed by law – something that was not done here. The Governor's specific decision in her amendment to redirect the casino revenue sharing payments in her sole discretion also separately violates the separation of powers doctrine. It is well settled that the Legislature is the only governmental branch authorized to appropriate State funds, and that it must do so by law, not by resolution – again, something that was not done here. Accordingly, both the amendment power on its face, and the particular terms of the Governor's Amendment to the Odawa compact, are constitutionally invalid.

But there is something more fundamental at stake on this remand too: namely, the validity of the underlying compacts themselves now that the Supreme Court has

concluded the compacts are valid contracts, and neither legislation nor instruments of gratuitous transfer. Valid contracts require consideration. This means that both parties to a valid contract give some things up in exchange for receiving other things. The necessary implication of the Supreme Court's holding is that the State of Michigan did give something up in the compacting process, for there is no other way for the compacts to be valid contracts, as the Supreme Court held. But this, in turn, means that this Court's earlier decision in *Tiger Stadium* has been effectively overruled, and that the payment terms of not just the Governor's Amendment but also the original compacts are constitutionally infirm as a violation of the separation of powers. Because the payment terms of the compacts are expressly non-severable, the entire compacts must necessarily fail.

Accordingly, by faithfully applying the holding of the Supreme Court, this Court should declare void not only the Governor's purported July 2003 amendment, but also the four underlying gaining compacts as well

* * *

ARGUMENT

The amendment provision of the compacts purports to give the Governor unconstrained power to deal with the compacting Tribes on the number of casinos allowed to each Tribe, the amount of money (if any) payable by the Tribes to the State and to local governments, the legal age for gambling in Tribal casinos, the disposition of tens of millions of dollars (or more) in Tribal gambling payments, and a host of other critical issues. By the terms of the compacts themselves, the Legislature has no power to approve – or even consult on – any proposed amendments.

Rather, the Governor acts unilaterally for the State and merely informs the Legislature of her decisions after she binds the State to them.

The Michigan Constitution does not permit such an audacious abdication of power by the Legislature to the Governor. The amendment provision of the compacts is facially invalid because Article 3, Section 2 of the Michigan Constitution mandates separation of powers between the three branches of State government. This separation does not permit the Governor to act on her own to bind the State to compact terms never approved by the Legislature, and it does not permit the Legislature to delegate authority to the Governor without sufficient guidelines for its exercise.

In addition, the redirection of State monies the Governor effectuated through the Amendment is an appropriation of State funds, a right that the Legislature alone must carry out "by law." Const 1963, art 9, § 17. But no law has ever approved the Governor's Amendment (the Governor acted unilaterally) or, for that matter, the underlying compacts (the Legislature acted by resolution, not statutory enactment). Because the monetary terms of the original compacts, including the Odawa compact as amended, are expressly non-severable, Compact (Ex A) § 12(E), the defect in the monetary provisions of the Governor's Amendment invalidates the Amendment in its entirety. Moreover, based on the Supreme Court's holding that the original compacts themselves are valid contracts, and neither legislation nor gift, the underlying compacts themselves are invalid for the same reason.

* * *

II. The Governor's Amendment Also Violates the Separation of Powers Clause Because It Improperly Appropriates State Funds – a Power Reserved Exclusively to the Legislature.

The original compacts require that the Tribes make 8% of net win payments to the Michigan Strategic Fund ("MSF"). Compact (Ex A) § 17. The Governor's Amendment changes these payment terms. In exchange for an additional casino, the Governor's Amendment provides for new payments. Even more significant, the Governor's Amendment removes the MSF as the recipient, and simply provides for "[p]ayment to the State, as directed by the Governor or designee." Compact Amendment (Ex C) § 17(C). Therefore, the Governor, with no input or ratification from the Legislature, granted herself the open-ended and unlimited power to direct the flow of this "important revenue to the State." Compact (Ex A) § 17(A). The separation of powers clause precludes such conduct, because the power to appropriate State funds is reserved exclusively to the Legislature. *Civil Service Comm of Michigan v Auditor General,* 302 Mich 673, 682; 5 NW2d 536 (1942) ("The control of the purse strings of government is a legislative function.").

A. The Governor's Amendment is an Unconstitutional Appropriation of State Funds in Violation of the Separation of Powers Doctrine.

The Governor does not have the unilateral authority to direct and control State funds. *See International Union v State of Michigan*, 194 Mich App 489; 491 NW2d 855 (1992). To the contrary, this is a job reserved exclusively to the Legislature: State funds must be appropriated "by

law" in accordance with Article 9, Section 17 of Michigan's Constitution. In the words of this Court: "The legislature enacts laws and appropriates funds. The executive branch of the government executes the laws and spends appropriated funds for designated purposes." *International Union,* 194 Mich App at 501. This separation of powers protects the legislative prerogative to control the purse strings of government:

> [t]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and *not to be surrendered or abridged,* save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system.

Civil Service Comm, 302 Mich at 682; 5 NW2d 536 (1942) (emphasis added).

The Governor's Amendment falls outside this Court's holding in *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *app den. by Hart v Engler,* 453 Mich 866; 522 NW2d 180 (1996). *Tiger Stadium* dealt with seven Indian gambling compacts[5] negotiated by

[5] These compacts did not include the four compacts at issue in this case.

Governor Engler as part of a settlement of federal litigation against the State. This Court determined that the compact payments in that case were not State funds subject to the appropriation clause, because (1) the funds were simply "gratuitous payments" in exchange for which the State gave up nothing, and (2) the "gratuitous payments" were made with a specifically designated purpose, namely, contribution to the MSF.[6]

The Governor's Amendment is critically different in both respects. First, the Governor obviously gave something up in exchange for the new payment terms: a second casino. Second, she removed the specifically designated purpose tied to the payments and substituted instead a generic obligation to pay "the state" in whatever way she alone decided to direct. Compact Amendment (Ex C) § 17(C) (all casino revenue-sharing payments are to go "to the State, as directed by the Governor or designee"). Accordingly, under the rules announced by *Tiger Stadium*, the new payment provisions of the Governor's Amendment plainly amount to an appropriation of State funds without the constitutionally required "appropriation[] made by law," Const 1963, art 9, § 17, in violation of the separation of powers.[7] The payment provision of the Governor's Amendment is therefore void.

---

[6] The Court relied on the specific designation to take the payments outside the statutory rules governing general purpose gifts. *Tiger Stadium*, 217 Mich App at 452. *See* MCL 21.161. These rules require that the Governor report monies received by "the State" to the Legislature for ultimate disposition as provided by law.

[7] Both the Michigan Senate Majority Leader and the Michigan Appropriations Chair agree that the Governor's diversion of funds through the Compact Amendment amounts to an illegal appropriation. *See* TOMAC v. Michigan, Brief of Amici Curiae Senate Majority Leader

(Continued on following page)

B. The Supreme Court's Holding in *TOMAC* that State-Tribal Compacts are Valid Contracts, and Neither Legislation nor Gift, Effectively Overrules *Tiger Stadium*, and Makes All Compact Payments – Whether to the MSF or Otherwise – Subject to Legislative Control by Appropriation.

This Court in *Tiger Stadium* rested its holding that compact payments were not subject to appropriation on the theory that the State "gave up nothing" and did not "concede or give away anything" in exchange for the payments. *Tiger Stadium,* 217 Mich App at 449; 553 NW2d 7. Because there was no exchange between the parties, this Court reasoned, the casino payments merely amounted to "gifts," "grants," or "gratuitous payments" designated for a specific purpose, which are not subject to appropriation. *Id.* at 453-454; 553 NW2d 7. The logical converse is that if the State *had* given something in exchange, the payments would be State funds subject to appropriation.

This critical premise of *Tiger Stadium* cannot survive the Supreme Court's determination in this case that the compacts are "valid contracts." *TOMAC*, 471 Mich at 312; 685 NW2d 221. It is a long-established principle of Michigan law that for a contract to be valid, it must be supported by consideration exchanged by both parties. *See, e.g., Yerkovich v AAA,* 461 Mich 732; 610 NW2d 542 (2000) ("An essential element of a contract is legal consideration"); *Higgins v Monroe Evening News,* 404 Mich 1, 21; 272 NW2d 537, 544 (1978) (ruling that gratuitous promises did not

---

Ken Sikkema and Shirley Johnson, Appropriations Chair, attached as *Exhibit D.*

create an employment contract). Therefore, under Michigan contract law, for the compacts to be valid contracts, the State *must have given something* in return for the Tribe's net win payments and other obligations. It is axiomatic that a gratuitous exchange cannot be a contract and a contract cannot be a gratuitous exchange: "The most significant class of promises unenforceable for lack of consideration is made up of purely gratuitous (or gift) promises – promises for which there has been no exchange at all." A. Allan Farnsworth, Contracts, p 49 (2d ed., 1990). Accordingly, under the rationale of the Supreme Court's decision in this very case, the compact payments at issue in *Tiger Stadium* could not have been gratuitous payments, but instead are "State funds" subject to appropriation. To hold otherwise would make the compact promises unenforceable.

Of course, the same is true for the payment terms of the original compacts at issue in this case. Because the Supreme Court found that the original compacts were "valid contracts," they must have been supported by adequate consideration. The State, in other words, must have given something up in exchange for the payments. But this, in turn, means that the payment terms of the original compacts also required an "appropriation[] by law," and that the failure of the Legislature to approve the appropriation by legislative enactment violated the appropriation and separation of powers clauses of the Michigan Constitution. The Supreme Court did not address this issue, confining its ruling to the question of whether the enactment clause of the constitution required approval of the compact by bill. Accordingly, this Court can and should apply the logical consequences of the Supreme Court's decision in the first instance and hold the compacts'

appropriation clauses invalid, permitting the Supreme Court, if it so desires, to review the question on application.

III. The Constitutional Infirmity of the Payment Provisions of the Original Compacts and the Governor's Amendment Require Invalidation of the Entire Governor's Amendment and the Compacts Themselves.

The Odawa compact at issue here is identical in all material respects to the other three compacts the Legislature ratified by resolution. Among other things, each of the four compacts contains the same severability clause, which states:

> In the event that any section or provision of the Compact is disapproved by the Secretary of the Interior or the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. *This severability provision does* ***not*** *apply to Sections 17 and 18 of this Compact.*

Compact (Ex A) § 12(E) (emphasis added). Section 17 of the compacts is the payment provision. Accordingly, if the payment provisions fail, the compacts are invalidated in their entirety. *See Dumas v Auto Club Ins Assoc*, 437 Mich 521, 537; 473 NW2d 652 (1991) (holding that if the terms of a contract are not severable, and part of the contract is void, the entire contract is unenforceable).

TOMAC has always maintained that a State's ratification of a gaming compact requires a legislative act, and TOMAC has filed a petition for Certiorari before the United

States Supreme Court to vindicate this point. This Court cannot and should not revisit the Michigan Supreme Court's holding; however, it is bound to follow the logical implications of that holding with respect to the compacts. Since all of the payment provisions here fail – the Governor's Amendment under *Tiger Stadium,* and the compacts as a whole under the contract analysis undertaken by the Michigan Supreme Court – the amendment provision and all four compacts, in their entirety, are invalid. This Court should therefore declare the four compacts void and unenforceable.

CONCLUSION

For the foregoing reasons, TOMAC respectfully requests that this Court declare unconstitutional the four gaming compacts as well as the Governor's Amendment of the Odawa compact.

Dated: November 5, 2004

WARNER NORCROSS & JUDD LLP

By /s/ John J. Bursch
Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Daniel K. DeWitt (P51756)
John J. Bursch (P57679)
Business Address:
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
Telephone: (616) 752-2000
Counsel for Taxpayers of Michigan
Against Casinos

STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and **LAURA BAIRD**, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs/Appellees/
Cross-Appellants,

-v-

THE STATE OF MICHIGAN,

Defendant/Appellant/
Cross-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC. IV, a Florida corporation, and **GAMING ENTERTAINMENT (Michigan), LLC**, a Delaware limited liability company, **LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**,

Intervening Defendants/
Appellants/Cross-Appellees.

Court of Appeals
No. 225017

Ingham County Circuit
Court No. 99-90195-CZ

INTERVENING DEFENDANT/APPELLANT/ CROSS-APPELLEE GAMING ENTERTAINMENT, LLC'S MOTION TO STRIKE ARGUMENTS ADVANCED IN SECTIONS II.B AND III OF PLAINTIFF/APPELLEE/CROSS-APPELLANT TAXPAYERS OF MICHIGAN AGAINST CASINOS' SUPPLEMENTAL BRIEF ADDRESSING COMPACT AMENDMENT

Submitted by:

Richard D. McLellan (P17503)
R. Lance Boldrey (P53671)
Kristine N. Tuma (P59964)
DYKEMA GOSSETT PLLC
124 W. Allegan, Suite 800
Lansing, MI 48933-1724
(517) 374-9138

Attorneys for Gaming Entertainment, LLC

Intervening Defendant/Appellant/Cross-Appellee Gaming Entertainment, LLC, ("GE"), by its attorneys Dykema Gossett PLLC, moves this Court under MCR 7.211(A) to strike Sections II.B and III of Plaintiff/Appellee/Cross-Appellant Taxpayers of Michigan Against Casinos' ("TOMAC") self-styled "Supplemental Brief Addressing Compact Amendment" ("Supplemental Brief"), in support of its motion, GE states as follows:

1. On July 30, 2004, the Michigan Supreme Court issued its Opinion remanding to this Court the sole question of "whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers

doctrine found in Const 1963, art 3, §2." *Taxpayers of Michigan Against Casinos v Michigan,* 471 Mich 306, 333; 685 NW2d 221 (2004).

2. On October 8, 2004, this Court issued an Order authorizing all parties in this case to "file briefs addressing (1) whether the provision in the tribal-state gaming compact of the Little Traverse Bay Band of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause."

3. On November 5, 2004, TOMAC filed its Supplemental Brief with this Court.

4. In Sections II.B and III of its Supplemental Brief, TOMAC addresses far more than the compact amendment clause or the amendment itself, arguing that all payments made by the tribes pursuant to Section 17 of the *original* compacts violate the appropriation and separation of powers clauses of the Michigan Constitution. *See* Const 1963, art 9, § 17; Const 1963, art 3, § 2. Since Section 17 allegedly is not severable from the compacts, TOMAC further asks this Court to rule that the original compacts themselves are invalid.

5. The arguments advanced in Sections II.B and III of TOMAC's Supplemental Brief are far outside the scope of the remand by the Supreme Court, and also conflict with the clear mandate of this Court's October 8, 2004

Order. Consequently, GE was taken completely by surprise by TOMAC's improper attempt to raise these issues. Indeed, since the issues directed by the Courts to be addressed on remand were so narrow, and did not implicate GE's interests, GE chose not to file an initial brief on remand in order to preserve judicial economy and permit those parties with a stronger interest in these issues to be heard. GE does, however, have an interest in the validity of the compacts, the issue that has been litigated for five years and decided by the Supreme Court, and on which TOMAC now attempts to interject new arguments. Should this Court consider those arguments, GE would wish to be heard.

6. This Court should strike Sections II.B and III of TOMAC's Supplemental Brief because parties may argue on remand only those issues that are within the scope of the higher court's remand order. *See Toth v Autoalliance International Inc,* 246 Mich App 732, 740; 635 NW2d 62 (2001); *In re Osborne,* 237 Mich App 597, 611 n7; 603 NW2d 824 (1999); *People v Burks,* 128 Mich App 255, 257; 339 NW2d 734 (1983); *People v LeFlore,* 122 Mich App 314, 320; 333 NW2d 47 (1983).

7. By raising these issues now, TOMAC improperly attempts to expand this Court's jurisdiction beyond the scope of the Supreme Court's remand. As this Court has previously held, "[t]he power of a lower court on remand is to take such action as law and justice require **that is not inconsistent with the judgment of the [higher] appellate court**." *McCormick v McCormick,* 221 Mich App 672, 679; 562 NW2d 504 (1997) (emphasis added).

8. This Court cannot grant TOMAC's request and find that the original compacts are invalid as violative of

the separation of powers clause of the Michigan Constitution without conflicting with the Supreme Court's ruling that the compacts are valid. (TOMAC Supplemental Brief at 14-17). *TOMAC, supra.* Concerning the original compacts, the Supreme Court left open only the question of whether the gubernatorial amendment provision and/or its application in the context of the amendment to the LTBB compact violates principles of separation of powers. The Supreme Court did not direct this Court to consider, as TOMAC urges, whether the tribal payments provisions of the compacts, and by extension the compacts themselves, are constitutionally infirm. As such, this Court has no authority to make the ruling TOMAC seeks, and this Court should strike those portions of TOMAC's Supplemental Brief that raise these arguments.

9. This Court also should strike Sections II.B and III of TOMAC's Supplemental Brief because res judicata prohibits this Court "from considering issues not considered by the appellate court during a prior appeal, if the issues could have been raised on the prior appeal." *Hadfield v Oakland County Drain Comm'r,* 218 Mich App 351, 355; 554 NW2d 43 (1996). *See also Vanderwall v Midkiff* 186 Mich App 191, 196-201; 463 NW2d 219 (1990) (stating generally that "the principles of res judicata require that a party bring in the initial appeal all issues which were then present and could have and should have been raised"); *Arco Industries Corp v American Motorists Ins Co,* 232 Mich App 146; 594 NW2d 61 (1998), aff'd 462 Mich 896; 617 NW2d 330 (2000), (finding that an issue not raised when the case was first before the Court of Appeals could not be raised on remand).

10. TOMAC should not be permitted to advance a new argument that it could have (but did not) raise in its

initial complaint, or in proceedings before the Circuit Court, this Court, or the Supreme Court. TOMAC should recognize its loss on the issue of the nature of the compacts as contracts and the Supreme Court's clear ruling that the Legislature did not have to act by bill in approving the compacts, and should not be permitted to again relitigate this case, wasting judicial resources and further hindering resolution of this case that has been litigated ad nauseum. TOMAC's arguments in Sections II.B and III of the Supplemental Brief advance a mistaken theory that, since the compacts are contracts, this Court's earlier decision in *Tiger Stadium Fan Club Inc v Governor,* 217 Mich App 439; 553 NW2d 7 (1996), was in error. Although TOMAC had ample opportunity to raise this argument in its earlier pleadings, and although GE and the State of Michigan have argued from the beginning of this litigation that the compacts are in fact contracts, TOMAC chose not to make this argument until now. These arguments cannot and should not be made at this point in these proceedings.

11. Gaming Entertainment, LLC has filed a Motion for Immediate Consideration concurrently with this Motion, requesting that this Court immediately consider this Motion to Strike.

WHEREFORE, Gaming Entertainment, LLC respectfully requests that this Honorable Court grant its Motion for Immediate Consideration and also grant its Motion to

Strike, and strike Sections II.B and III from TOMAC's Supplemental Brief.

Respectfully submitted,

DYKEMA GOSSETT PLLC
Richard D. McLellan (P17503)
R. Lance Boldrey (P53671)
Kristine N. Tuma (P59964)

By: /s/ Kristine N. Tuma
Kristine N. Tuma
Attorneys for Gaming Entertainment, LLC
124 W. Allegan, Suite 800
Lansing, MI 48933-1724
(517) 374-9138

Dated: November 12, 2004

Court of Appeals, State of Michigan

ORDER

Taxpayers of Michigan Against Casinos v State of Michigan	Donald S. Owens Presiding Judge
Docket No. 225017	Stephen L. Borrello
LC No.99-090195-CZ	Bill Schuette Judges

The Court orders that the motion for immediate consideration and the motion to strike are GRANTED.

Schuette, J. would grant the motion for immediate consideration and deny the motion to strike.

/s/ Donald S. Owens
Presiding Judge

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 9 2004
Date

/s/ Sandra Schultz Mengel
Chief Clerk

---

25 U.S.C. § 2710(d)

Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that –

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection –

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(3)

DEC 30 2004

No. 04-581

In the Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,
Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,
Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT STATE OF MICHIGAN'S BRIEF IN OPPOSITION

EUGENE DRIKER
Counsel of Record
THOMAS F. CAVALIER
BARRIS, SOTT, DENN & DRIKER, PLLC
211 WEST FORT STREET
15TH FLOOR
DETROIT, MI 48226-3281
(313) 965-9725

Counsel for Respondent State of Michigan

Becker Gallagher Legal Publishing, Inc. 800.890.5001

COUNTER-STATEMENT OF QUESTION PRESENTED

The federal question discussed by the Michigan Supreme Court is not subject to this Court's jurisdiction. However, if this Court disagrees and decides to review that question, the issue is properly stated as follows:

> Does the federal Indian Gaming Regulatory Act confer upon a state the power to regulate gaming on tribal lands where the Indian tribe has not consented to state regulation of its gaming activities in the compact entered into between the Indian tribe and the state?

COUNTER-LIST OF PARTIES

Petitioner has listed North American Sports Management Company, Inc., IV, as a party in this case. However, it was dismissed from this case by the Michigan Court of Appeals on August 12, 2002 and is no longer a party in this proceeding. Accordingly, the only parties in this case are:

Taxpayers of Michigan Against Casinos
The State of Michigan
Gaming Entertainment, LLC

TABLE OF CONTENTS

Page(s)

COUNTER-STATEMENT OF QUESTION PRESENTED i

COUNTER-LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTRODUCTION 1

COUNTER-STATEMENT OF JURISDICTION 3

COUNTER-STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 4

I. Background 4

II. Proceedings in the State Courts 6

A. The Trial Court's Decision 6

B. The Michigan Court of Appeals' Decision . . 7

C. The Michigan Supreme Court's Opinion . . . 7

REASONS FOR DENYING THE PETITION 10

I. This Court Lacks Jurisdiction Because there is an Adequate and Independent State Ground for the Judgment of the Michigan Supreme Court 10

II. There is no Split of Authority on the Federal Issue between the Michigan Supreme Court and either the Federal or State Courts 14

A. There is no conflict between the Michigan Supreme Court and the Ninth Circuit . . . 15

B. There is no conflict between the Michigan Supreme Court and other state supreme courts 17

III. The Issues Involved in this Case are of Local, not National, Importance 20

IV. The Michigan Supreme Court's Decision is Correct on the Merits 23

CONCLUSION 28

APPENDIX

Appendix A - Michigan Gaming Control Board Tribal-State Compact Agreement 1a

Appendix B - 6/9/99 - Complaint for Declaratory Relief 35a

Appendix C - 11/20/03 - Michigan Supreme Court Brief on Appeal - Appellant 55a

INDEX OF AUTHORITIES

Page(s)

Cases

Artichoke Joe's California Grand Casino v. Norton,
353 F.3d 712 (9th Cir. 2003) 15, 16

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 11

Boerth v. Detroit City Gas Co.,
152 Mich. 654; 116 N.W. 628 (1908) 12

City of Kalamazoo v. Kalamazoo Circuit Judge,
200 Mich. 146; 166 N.W. 998 (1918) 12

Cuyler v. Adams, 449 U.S. 433 (1981) 20

Detroit v. Michigan Public Utilities Commission,
288 Mich. 267; 286 N.W. 368 (1939) 12

Gaming Corp. of America v. Dorsey & Whitney,
86 F.3d 536 (8th Cir. 1996) 22

Herb v. Pitcairn, 324 U.S. 117 (1945) 10, 11, 14

Jankovich v. Indiana Toll Road, 379 U.S.487 (1965) . . 13

Kansas v Finney,
251 Kan. 559; 836 P.2d 1169 (1992) 17, 19

Michigan v. Long, 463 U.S. 1032 (1983) 10

Minnesota v. National Tea Co., 309 U.S. 551 (1939) . . 13

Narragansett Indian Tribe of Rhode Island v. Rhode Island,
667 A.2d. 280 (R.I. 1995) 18, 19

New Mexico v. Johnson,
120 N.M. 562; 904 P.2d 11 (1995) 17, 19

New York v. Hill, 528 U.S. 110 (2000) 20

Panzer v. Doyle, 680 N.W.2d. 666 (Wis. 2004) 18, 19-20

Pueblo of Santa Ana v. Kelly,
104 F.3d 1546 (10th Cir. 1997) 22

Saratoga County Chamber of Commerce, Inc. v. Pataki,
798 N.E.2d 1047 (N.Y. 2003) 18, 19

Seminole Tribe of Florida v. Florida,
517 U.S. 44 (1996) 21

Taxpayers of Michigan Against Casinos v.
State of Michigan,
471 Mich. 306; 685 N.W.2d 221 (2004) . . . . . *passim*

United Keetoowah Band of Cherokee Indians v. Oklahoma,
927 F.2d 1170 (10th Cir. 1991) 16, 24

West Virginia ex rel. Dyer v. Sims,
341 U.S. 22 (1951) 20

Yakus v. United States, 321 U.S. 414 (1944) 27

Statutes

18 U.S.C. § 1166 . . . . . *passim*
18 U.S.C. § 1166(a) 23, 24
18 U.S.C. § 1166(c) 24
25 U.S.C. § 2701, *et seq.* (IGRA) . . . . . *passim*
25 U.S.C. § 2701(5) 25
25 U.S.C. § 2710(d)(1)(B) 15
25 U.S.C. § 2710(d)(3)(c) 25
25 U.S.C. § 2710(d)(5) 25

Other Authority

House Concurrent Resolution 115 . . . . . 6, 11, 12, 13, 27
Mich. Const. 1963 art. 3, § 2 6
Mich. Const. 1963 art. 4, § 22 . . . . . 4, 6, 8, 11
Mich. Const. 1963 art. 4 § 26 6
S. Rep. No. 100-446 22
U.S. Const. art. I, § 8 21
U.S. Const art. I, § 10 . . . . . 3, 20, 21
U.S. Const art. I, § 10, cl. 3 21

Respondent State of Michigan ("State") opposes and asks that this Court deny Petitioner Taxpayers of Michigan Against Casinos' ("Petitioner" or "TOMAC") Petition for a Writ of Certiorari to the Michigan Supreme Court ("Petition") for the reasons set forth below.

INTRODUCTION

TOMAC's Petition is an unfounded attempt to have this Court intervene into what is essentially a state law dispute that was resolved by Michigan's highest court on state law grounds. From the inception of this action, TOMAC has always claimed only violations of the Michigan constitution -- it has never asserted a violation of any federal rights. TOMAC's principal claim was that the Michigan legislature violated the Michigan constitution when it approved four gaming compacts between the State and four Indian tribes by a resolution, rather than by a bill. It argued that the legislature must express its approval by bill because the compacts are "legislation" within the meaning of a provision in the Michigan constitution requiring that "legislation" be handled through the bill procedure.

The Michigan Supreme Court disposed of that claim on adequate and independent state grounds. Relying exclusively on its own prior decisions, the court interpreted the term "legislation" in the Michigan constitution as referring to "unilateral regulation". It then concluded that the compacts did not fall within that definition because they resulted from the mutual consent of both the State and the tribes rather than from the unilateral imposition of the legislative will on the tribes. The court found further support for this conclusion in the substantive terms of the compacts, which gave no regulatory role to the State.

The court did find the contractual nature of the Michigan compacts to be consistent with the federal statute that authorized the compacts, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.* It viewed IGRA as barring the states from unilaterally regulating tribal gaming in the absence of the tribe's consent to such regulation in a compact. But the court's understanding of IGRA did not decide the outcome of the state constitutional issue. Even if the states could regulate in the absence of tribal consent, the compacts at issue here would still be the products of mutual consent. And it was the mutual consent aspect of the compacts that the court found rendered them to be contracts, and not legislation, under Michigan law.

Fundamentally, the Michigan court resolved a state law question -- whether the Michigan constitution required the Michigan legislature to enact a bill to approve the State's compact with a tribe – on adequate and independent state grounds. No federal question subject to this Court's jurisdiction is presented.

Even assuming that there is a federal question subject to this Court's review, Petitioner has failed to show that it merits granting a writ of certiorari. The asserted federal question is whether a state may regulate gaming on tribal lands in the absence of tribal consent in a compact. The Michigan Supreme Court's view that a state has no such power has not created a split of authority among the courts. Its view is consistent with the Ninth Circuit case relied upon by Petitioner. The Ninth Circuit said that IGRA gives state gaming law an "effect" in tribal lands in the absence of a compact. The Michigan Supreme Court did not disagree, holding that such state laws apply as the federal law in Indian country. Petitioner also says that the Michigan court's decision upholding the compacts is in conflict with the

decisions of other state supreme courts that invalidated compacts before those courts. But those cases have no federal question in common with the Michigan case and, moreover, were decided on the constitutional law of the states involved and on distinguishable facts.

Next, Petitioner argues that the federal question that it presents for review is of national importance. Here, Petitioner's argument is based on a gross misstatement of the applicable law. It is premised on the notion that a tribal-state gaming compact is authorized by the federal Interstate Compact Clause when, in fact, this Court has recognized that it derives from the federal Indian Commerce Clause. Petitioner also asserts that the proffered federal question is of national importance due to the "socio-economic" impact of tribal gaming. But Petitioner's legal issue has nothing to do with the desirability of such consequences.

Finally, Petitioner's assertion that the Michigan Supreme Court's view of federal law is wrong is refuted by the plain language of the IGRA provision relied upon by Petitioner. That provision, 18 U.S.C. § 1166, plainly says that state gaming laws are applicable on tribal lands in the absence of a compact "for the purpose of Federal law." Thus, the Michigan court's view that IGRA "federalizes" state gaming law gives full effect to the statutory language.

COUNTER-STATEMENT OF JURISDICTION

As set forth in detail in the Reasons for Denying the Petition, this Court lacks jurisdiction because there is an adequate and independent state ground for the judgment of the Michigan Supreme Court.

COUNTER-STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The central constitutional provision involved is Article IV, Section 22 of the Michigan Constitution, which provides: "All legislation shall be by bill and may originate in either house." Mich. Const. 1963, art. IV, § 22. In addition, the full text of 18 U.S.C. § 1166 is involved. The full statute appears on pages App. 13-14 of the Petitioner's Appendix.

STATEMENT OF THE CASE

I. Background.

In 1997 and 1998, Michigan's then-Governor John Engler negotiated gaming compacts with four Indian tribes located in Michigan: the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians and the Nottawaseppi Huron Band of Potawatomi Indians. These compacts between the State and the tribes ("Michigan Compacts") provided the terms under which the tribes could conduct casino-style gaming on their lands located within the State pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*

Under the Michigan Compacts, the parties agreed as to the types of games that would be conducted by the tribes and the tribes agreed to limit gaming to specified "[e]ligible Indian lands." (Michigan Compacts, §§ 2,3; App., 5a, 6a.)[1] The tribes agreed to make semi-annual payments to the local governments affected by the casinos and semi-annual

---

[1] The terms of the four Michigan Compacts are substantially the same. A sample compact is included in Appendix A.

payments to the Michigan Strategic Fund, which is a unit of State government. (Michigan Compacts, §§ 17 and 18; App., 28a-33a.) The tribes also agreed to certain "regulatory requirements." (Michigan Compacts, § 4; App., 9a-17a.) However, the tribes, not the State, assumed "responsibility to administer and enforce the regulatory requirements." (Michigan Compacts, § 4(M)(1); App., 14a.) Indeed, the Tribes agreed to post a sign in their casinos informing patrons that "THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN." (Michigan Compacts, § 8; App., 20a-21a.)

The State and the tribes also agreed to an amendment procedure. (Michigan Compacts, § 16; App., 25a-27a.) Under that provision, Michigan's Governor may agree on behalf of the State to an amendment without the approval of the Michigan legislature. No Michigan Compact had been amended until Michigan's current Governor, Jennifer Granholm, agreed to amend the Michigan Compact between the State and the Little Traverse Bay Bands of Odawa Indians on July 22, 2003 ("Little Traverse Amendment").

Significantly, the Michigan Compacts did not become effective unless and until both the tribes and the Michigan legislature approved them. Section 11 of each compact provides in pertinent part:

> This Compact shall be effective immediately upon:
>
> (A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;
>
> (B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution

> of the Michigan Legislature[.] (Michigan Compacts, § 11; App., 22a.)

The Michigan legislature approved the Michigan Compacts by passing House Concurrent Resolution ("HCR") 115 on December 10 and 11, 1998.

II. Proceedings in the State Courts.

A. The Trial Court's Decision.

On June 10, 1999, Petitioner filed a complaint in the Circuit Court of Ingham County, Michigan, seeking a declaration that the Michigan Compacts violated three separate provisions of the Michigan constitution. (Complaint; App., 35a-54a.) In Count I of its complaint, Petitioner claimed that the Michigan legislature's approval of the Michigan Compacts by concurrent resolution violated the provision of the Michigan constitution requiring that all legislation be by bill, Mich. Const. 1963, art. 4, §22 ("Bill Provision"), because the Michigan Compacts were effectively "legislation." (Complaint, ¶¶ 47-53; App., 49a-50a.) Count II asserted that the State violated the provision of the Michigan constitution prescribing the procedure to be followed for the purpose of enacting a local or special act, Mich. Const. 1963, art. 4, §26 ("Local Acts Provision"). (Complaint, ¶¶ 54-62; App., 50a-52a.) Finally, Count III alleged that the amendment provision in the Michigan Compacts violated the Separation of Powers Clause of the Michigan constitution, Mich. Const. 1963, art. 3, §2. (Complaint ¶¶ 63-69; App., 53a-54a.)

On the parties' cross-motions for summary judgment, the trial court ruled that (1) the Michigan legislature violated the Bill Provision because the Michigan Compacts were

"legislation," and were, therefore, required to be approved through the bill process prescribed by the constitution, (2) the Local Acts Provision did not apply to the Michigan Compacts, and (3) the amendment provision violated the Separation of Powers Clause because it delegated law-making authority to the Governor.

B. The Michigan Court of Appeals' Decision.

Petitioner and the State both appealed to Michigan's intermediate appellate court. In its November 12, 2002 opinion, the Michigan Court of Appeals reversed the trial court's ruling on the claim that the Michigan legislature had violated the Bill Provision, holding that the Michigan Compacts were not "legislation," and affirmed the trial court's decision that the Michigan legislature had not violated the Local Acts Provision. *Taxpayers of Michigan Against Casinos v. State of Michigan*, 254 Mich. App. 23, 49; 657 N.W.2d 503, 517 (2002). The Court of Appeals further held that the claim that the amendment provision violated the Separation of Powers Clause was not ripe for review since, at that time, the Governor had not yet agreed to any amendment. *Id.*, 254 Mich. App. at 48; 658 N.W.2d at 517.

C. The Michigan Supreme Court's Opinion.

The Michigan Supreme Court granted leave to appeal on September 23, 2003, and issued its opinion on July 30, 2004. *Taxpayers of Michigan Against Casinos v. State of Michigan*, 471 Mich. 306; 685 N.W.2d 221 (2004) ("*TOMAC*").

In the *TOMAC* decision, the Michigan Supreme Court affirmed the Michigan Court of Appeals' ruling that approval of the Michigan Compacts by resolution did not offend the Bill Provision because the Michigan Compacts were not

"legislation." The Bill Provision of the Michigan constitution provides that "all legislation shall be by bill[.]" Mich. Const. 1963, art. 4, § 22. The question of whether a resolution was a constitutionally permissible means of approving the Michigan Compacts "necessarily turns on the definition of 'legislation'" under the Michigan Constitution. *TOMAC*, 471 Mich. at 318; 685 N.W.2d at 226. The Michigan Supreme Court defined "legislation" for state constitutional purposes as "unilateral regulation." *Id.* It further emphasized that "[t]his unilateral action is what distinguishes legislation from contracts." *Id.*

The state court found that the Michigan Compacts had the characteristics of contracts and lacked those of legislation. The chief contractual feature of the Michigan Compacts is that they are the products of the mutual assent of the State and the tribes. "[T]he Legislature's role here requires mutual assent by the parties — a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating." *TOMAC*, 471 Mich. at 324; 685 N.W.2d at 229. The court found that this conclusion was consistent with IGRA. That statute does not view the compact as a vehicle for unilateral state regulation unless the tribe consents to such authority. "The only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact." *Id.*, 471 Mich. at 321; 685 N.W.2d at 228. The court rejected Petitioner's position that 18 U.S.C. § 1166 grants regulatory power to the states in the absence of a compact. Instead, it found that § 1166 merely incorporates state gaming law as the federal law applicable in Indian country in the absence of a compact. "[A]lthough a state's gaming laws apply in the absence of a tribal state compact, they apply only as *federal law*." *Id.*, 471 Mich. at 322-323; 685 N.W.2d at 229 (emphasis in original). Here, the tribes gave no such consent in the Michigan

Compacts. Thus, under the Michigan Compacts, "[t]he state has no power to regulate the casinos[.]" *Id.*, 471 Mich. at 326; 685 N.W.2d at 230.

The Michigan Supreme Court also found that the substantive terms of the Michigan Compacts lacked the characteristics of legislation. For example, it found that "the compacts do not apply to the citizens of the state of Michigan as a whole; they only bind the two parties to the compact"; the "Legislature has not dictated the rights or duties of those other than the contracting parties"; "the compacts do not create any state agencies or impose any regulatory obligation on the state"; and they "do not create new forms of gaming[.]" *TOMAC*, 471 Mich at 325 - 326; 685 N.W.2d at 230-231.

The Michigan Supreme Court concluded that the Michigan legislature had the power to approve the Michigan Compacts by resolution. In reaching this conclusion, the state court first "turn[ed] to our Constitution." *TOMAC*, 471 Mich. at 327; 685 N.W.2d at 231. It stressed that "[u]nlike the federal constitution, our Constitution 'is not a grant of power to the legislature, but is a limitation upon its powers.'" *Id.*, quoting *In re: Brewster Street Housing Site*, 291 Mich. 313, 333; 289 N.W. 493 (1939). The court continued, "We have held that our Legislature has the general power to contract unless there is a constitutional limitation." *TOMAC*, 471 Mich at 328; 685 N.W.2d at 231. Because there are no constitutional restrictions on the Michigan legislature's power to bind the State to a compact with a tribe, and the constitution does not prescribe the method for doing so, the court "conclude[d] that the Legislature has the discretion to approve the compacts by resolution." *Id.*

Although the Michigan Supreme Court resolved the question of whether the Michigan Compacts were legislation within the meaning of the Bill Provision of the Michigan Constitution,[2] it did not reach the issue of whether the amendment provision in the Michigan Compacts violated the Separation of Powers Clause. The court found that the Little Traverse Amendment, which had been executed while this case was pending before it, made the issue ripe for review. But, because the "lower courts have not yet been able to assess this issue since the amendments," the court declined to resolve the issue itself. *TOMAC,* 471 Mich. at 333; 685 N.W.2d at 234. Instead, it "remanded this issue to the Court of Appeals to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Mich Const (1963), art 3, § 2." *Id.* The Michigan Court of Appeals has not yet released its decision on the remanded issue.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Because there is an Adequate and Independent State Ground for the Judgment of the Michigan Supreme Court.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117,125 (1945). That principle

---

[2] The Michigan Supreme Court also upheld the rulings by the lower state courts that the Michigan legislature had not violated the Local Acts Provision of the Michigan constitution. That ruling is not involved in the Petition.

"is based, in part, on 'the limitations of [the Court's] jurisdiction." *Michigan v. Long,* 463 U.S. 1032, 1041-1042 (1983), quoting *Herb,* 324 U.S. at 125. The "jurisdictional concern is that we not 'render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion.'" *Id.*, quoting *Herb,* 324 U.S. at 126.

In light of this jurisdictional limitation, this Court will not review a state court judgment merely to correct the state court's discussion of a federal question that is not essential to the judgment. "This Court . . . reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). *Accord, Herb,* 324 U.S. at 125-126 ("And our power is to correct wrong judgments, not to revise opinions."). Thus, this Court "should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds." *Black,* 351 U.S. at 298.

The judgment of the Michigan Supreme Court is supported by independent and adequate state grounds. The state court was called upon to resolve three claims in Petitioner's declaratory relief action. Each claim alleged a violation of the Michigan constitution alone. The issue presented by the principal claim was framed by the Michigan Supreme Court entirely in state constitutional terms: "(1) whether House Concurrent Resolution (HCR) 115 (1998), the Legislature's approval by resolution of tribal-state gaming compacts, constituted 'legislation' and therefore violated Mich. Const. (1963), art 4, § 22[.]" *TOMAC*, 471 Mich. at 312; 685 N.W.2d at 223. The resolution of that issue depended on the court's interpretation of the term "legislation" in that state constitutional provision.

"Resolution of whether HCR115 constituted legislation necessarily turns on the definition of 'legislation.'" *Id.*, 471 Mich. at 318; 226 N.W.2d at 226. The court found that the term "legislation" means "unilateral regulation," reasoning that the "Legislature is never required to obtain consent from those who are subject to its legislative power." *Id.*, 471 Mich. at 318; 685 N.W.2d at 226. In support of that conclusion, the court relied on its own decision in *Boerth v. Detroit City Gas Co.*, 152 Mich. 654; 116 N.W. 628 (1908). *Id.* That definition, based exclusively on Michigan law, led the state supreme court to make a distinction that provided the key to determining if the compacts were "legislation": "This unilateral action distinguishes legislation from contract[.]" *Id.* The Michigan Supreme Court drew further support for this distinction from its own decisions in *Detroit v. Michigan Public Utilities Commission*, 288 Mich. 267; 286 N.W. 368 (1939), and *City of Kalamazoo v. Kalamazoo Circuit Judge*, 200 Mich. 146; 166 N.W. 998 (1918). *Id.*

The opinion then turned to the question of whether the Michigan Compacts were legislation. First, the Michigan Supreme Court concluded that they were not legislation because, being the products of the mutual consent of the parties, the compacts were contracts.

> Here, the Legislature's approval of the compacts follows the *assent of the parties* governed by those compacts. Thus, the Legislature's role here requires *mutual assent by the parties – a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating*.

TOMAC, 471 Mich. at 324; 685 N.W.2d at 229 (emphasis supplied). Second, the state court found that the substantive terms of the compacts lacked the characteristics of legislation

under the state constitution. In particular, the court concluded that the Michigan Compacts gave no regulatory authority to the State: "The compacts do not create any state agencies or impose any regulatory obligation on the state." *TOMAC*, 471 Mich at 325; 685 N.W.2d at 230. Rather, under the terms of the Michigan Compacts, regulatory "responsibility falls on the tribes alone." *Id.* For these reasons, the Michigan Supreme Court held that "this Legislature's approval of the compacts through HCR115 did not constitute legislation" under the state constitution. *Id.*, 471 Mich. at 312; 685 N.W.2d at 223.

As the above summary demonstrates, the Michigan Supreme Court clearly resolved a claim under the Michigan constitution. Where a state court decides a claim under its own constitution, the state constitutional provision provides an adequate and independent ground for the decision. *See Jankovich v. Indiana Toll Road*, 379 U.S.487, 495-496 (1965)(where a "state court's opinion relies on similar provisions in both State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment.") This is particularly true where, as here, the state court's decision hinges on that court's *interpretation* of its state constitution. "It is important that this Court not indulge in needless dissertations on constitutional law. *It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.*" *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1939) (emphasis supplied).

Furthermore, the Michigan Supreme Court's resolution of the state constitutional claim did not depend on its view of the federal issue cited by Petitioner. In its opinion, the court surveyed the federal law regarding the state's authority to directly regulate tribal gaming. It then concluded that "[t]he

only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact." *TOMAC*, 471 Mich. at 321; 685 N.W.2d at 228. This conclusion, which Petitioner incorrectly attacks as a misstatement of federal law, did not determine the Michigan Supreme Court's ultimate holding that the compacts were not "legislation." What determined that holding is that the Michigan Compacts are the products of mutual assent and lack substantive terms granting regulatory authority to the State.

That holding would not be altered even if this Court were to disagree with the Michigan Supreme Court's determination that a state may not regulate tribal gaming in the absence of tribal consent. A different result on that issue would not convert the Michigan Compacts into "legislation" under state law. The Michigan Compacts would still be the products of mutual assent, not the result of unilateral state regulation. They would still lack a provision giving the state the power to regulate the tribe's gaming activities and other substantive terms that are, in the state court's determination, characteristics of legislation. In short, even if this Court were to address the federal issue, its "review would amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

II. There is no Split of Authority on the Federal Issue between the Michigan Supreme Court and either the Federal or State Courts.

Petitioner argues that there is a conflict between the Michigan Supreme Court's interpretation of federal law and a decision of the United States Court of Appeals for the Ninth Circuit and decisions of the supreme courts of Kansas, New York, New Mexico, Rhode Island and Wisconsin. Petitioner is incorrect.

A. There is no conflict between the Michigan Supreme Court and the Ninth Circuit.

The Ninth Circuit case cited by Petitioner is *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712 (9th Cir. 2003). In that case, non-Indian operators of certain card games challenged a California initiated law that authorized certain casino-style ("class III") games on tribal lands subject to compacts negotiated by the governor. They argued that the initiative did not satisfy the IGRA's requirement that California "permits such gaming," 25 U.S.C. § 2710(d)(1)(B), because the law did not authorize non-Indians to engage in that gaming activity. They argued that because IGRA does not "permit" California to regulate class III gaming on tribal lands, "permit" must refer to California's regulation of gaming on *non-Indian* land.

The Ninth Circuit acknowledged that the plaintiffs' argument was "plausible," but found that there was an "alternative understanding of the verb 'permit'." *Artichoke Joe's*, 353 F.3d at 721. Among the reasons supporting that alternative was the Ninth Circuit's view that "California may enact laws and regulations concerning gambling that have an effect on Indian lands via [18 U.S.C.] §1166." *Id.* at 722.

Petitioner asserts that the Ninth Circuit's interpretation of §1166 is contrary to the view that the Michigan Supreme Court expressed on that statute. But the views of the courts are entirely consistent. The Michigan Supreme Court did not disagree that a state's gaming laws and regulations may have an "*effect* on Indian lands via § 1166." *Artichoke Joe's*, 353 F.3d at 722 (emphasis supplied). The court pointed out that § 1166 "incorporates state laws as the federal law *governing nonconforming tribal gaming*" and that "a *state's gaming laws apply* [as federal law] in the absence of a tribal-state

compact[.]" *TOMAC,* 471 Mich. at 322; 685 N.W.2d at 229 (emphasis supplied). Both courts in fact agreed on how state gaming laws have an "effect" on Indian lands – through federal enforcement. The Ninth Circuit acknowledged that the "federal government retained the power to prosecute violations of state gambling laws in Indian country[.]" *Artichoke Joe's,* 353 F.3d at 722. The Michigan Supreme Court concurred that § 1166 "does not give a state enforcement power over violations of state gambling on tribal lands because 'the power to enforce the incorporated laws rests solely with the United States.'" *TOMAC*, 471 Mich. at 323; 685 N.W.2d at 229, quoting *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991).

Finally, even if the language in *Artichoke Joe's* and the *TOMAC* decision could be stretched to suggest a tension between the two, it would not justify granting certiorari. In each case, the discussion of Section 1166 is incidental to the court's ultimate holding. The Ninth Circuit found that, despite the alternative interpretation of the term "permits," it was left with "a statutory provision that is susceptible to more than one interpretation[.]" *Artichoke Joe's*, 353 F.3d at 722. Ultimately, the Ninth Circuit resolved that ambiguity by resorting to the canon of statutory interpretation that requires ambiguous language in a statute enacted for the benefit of Indians to be construed in their favor. *Id.* at 728-729. The Michigan Supreme Court also did not rest its holding on its view that Section 1166 made state gaming law applicable to Indian lands as federal law. As shown above, its ruling that the Michigan Compacts are not legislation was based on a completely different consideration – the fact that every compact is the product of mutual consent, which is not "legislation" under Michigan's constitution.

B. There is no conflict between the Michigan Supreme Court and other state supreme courts.

Petitioner contends that the Michigan Supreme Court's decision is in conflict with cases decided by its sister supreme courts in Kansas, New York, New Mexico, Rhode Island and Wisconsin. No such conflict exists. Petitioner points to no federal issue that the decisions in the other state cases have in common with the Michigan case. Instead, Petitioner asserts that these courts are in "conflict" with the Michigan Supreme Court merely because they struck down the compacts that were before those courts whereas the Michigan court upheld the compacts presented to it. But the decisions in those cases were based on the constitutions of *those states* under *different facts*. Obviously, that type of "conflict" between state courts is not sufficient to justify this Court's review.

The state cases cited by Petitioner all decided whether the constitutions of the states involved authorized the governor to enter into a tribal-state gaming compact, rather than whether federal law permitted a state to directly regulate tribal gaming.

- *Kansas v Finney*, 251 Kan. 559; 836 P.2d 1169, 1185 (1992): "[M]any of the provisions in the compact would operate as the enactment of new laws and the amendment of existing laws. The *Kansas Constitution* grants such power exclusively to the legislative branch of government." (Emphasis supplied.)

- *New Mexico v. Johnson*, 120 N.M. 562; 904 P.2d 11, 25 (1995): "We conclude that the Governor lacked authority under the *state Constitution* to bind the State by unilaterally entering into the compacts and revenue-

sharing agreements in question." (Emphasis supplied.)

- *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1049 (N.Y. 2003): Plaintiff's claim was that "by negotiating and signing the agreements without legislative authorization or approval [Governors Cuomo and Pataki] violated the principle of separation of powers under the *State constitution*[.]" (Emphasis supplied.)

- *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d. 280, 282 (R.I. 1995): "On the basis of *our particular state constitutional history and judicial interpretation*, we find no room in which to permit any such implied power over lotteries in the Governor, as Chief Executive, that would permit him to enter into any compact establishing a lottery operation and facility in this state." (Emphasis supplied.)

- *Panzer v. Doyle*, 680 N.W.2d. 666 (Wis. 2004): Wisconsin governor lacked authority to amend compact providing for indefinite duration "[u]nder *Wisconsin's* contemporary nondelegation doctrine[.]" (Emphasis supplied.)

The specific state law basis for each of these cases underscores the absence of any potential conflict with the Michigan Supreme Court on a *federal* question.

Furthermore, this case is distinguishable from the other state cases on its facts. Here, the Michigan Compacts that were negotiated and executed by the Governor were approved

by the Michigan legislature. In most of the other state cases, however, the governor acted alone.

- *Finney,* 836 P.2d at 1185: "*In the absence of* an appropriate delegation of power by the Kansas Legislature or *legislative approval of the compact*, the governor has no power to bind the State to the terms thereof." (Emphasis supplied.)

- *Johnson,* 904 P.2d at 23: The governor had entered into the compact "in the absence of any action on the part of the legislature[.]"

- *Saratoga County,* 798 N.E.2d at 1061: "[T]he State Executive lacks the power *unilaterally* to negotiate and *execute* tribal gaming compacts under IGRA." (Emphasis supplied).

- *Narragansett Indian Tribe*, 667 A.2d at 282: "[T]he Governor as Chief Executive lacked both constitutional as well as legislative authority to bind the State of Rhode Island" to an IGRA compact.

In addition, the substantive terms of the compacts are significantly different. The Michigan Compacts do not impose any obligations on the State, unlike the compacts in *Finney,* 836 P.2d at 1183 (compact created a state gaming agency), and *Saratoga County,* 798 N.E.2d at 1050 (oversight of gaming operations was vested in a state agency and specifically enumerated enforcement duties were assigned to the state police); they do not authorize more games than the State otherwise permitted, unlike the compact in *Johnson,* 904 P.2d at 21 (compact authorized more forms of gaming than New Mexico otherwise permitted); and they do not provide for an indefinite duration, unlike the compact in *Panzer,* 680

N.W.2d at 692 ("Governor was without authority to agree to duration provision").

In sum, there is no conflict on a federal question between the Michigan Supreme Court and the decisions of the supreme courts of Kansas, New Mexico, New York, Rhode Island, and Wisconsin. In fact, all of those cases were decided on the constitutions of the individual states and on different facts. Consequently, the decisions of those other states on the validity of the state action involved there does not create any conflict with the decision of the Michigan Supreme Court on the governmental action involved here.

III. The Issues Involved in this Case are of Local, not National, Importance.

Petitioner assets that this case presents issues of national importance. Its arguments for this position are simply incorrect.

First, Petitioner attempts to create an issue of national significance by arguing that a tribal-state gaming compact is authorized in the same manner as an interstate compact because the former is "authorized through IGRA under the Compact Clause of the United States Constitution, art. I, § 10." (Petition, p. 15.) It then suggests that this Court's case law recognizing that interstate compacts are subject to federal judicial review[3] applies equally to tribal-state gaming compacts.

---

[3] *See West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), *New York v. Hill*, 528 U.S. 110 (2000), *Cuyler v. Adams*, 449 U.S. 433 (1981).

The fallacy in Petitioner's argument is obvious. The Interstate Compact Clause concerns compacts between a State and another State, not an Indian tribe. It provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with *another State* . . . ." Art. I, §10, cl. 3 (emphasis supplied). Tribal-state gaming compacts, however, take their authority from a different constitutional provision. They were created by IGRA, which was enacted pursuant to the Indian Commerce Clause, U.S. Const. art. I, § 8. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996) (IGRA was "passed by Congress under the Indian Commerce Clause . . ."). Thus, this Court's jurisprudence recognizing that interstate compacts are subject to federal judicial review has no application to a tribal-state gaming compact.[4]

Next, Petitioner argues that the "prevalence of [IGRA] compacts requires certainty and national uniformity, not only for citizens, but for the co-sovereign States and Tribes that enter into gaming compacts." (Petition, p. 16.) But this case cannot provide any "certainty" or "national uniformity" on the means by which a state enters into an IGRA compact. Those means are not specified by IGRA.[5] Rather, it has been

---

[4] Petitioner's argument that the Interstate Compact Clause cases apply to tribal-state gaming compacts is as disingenuous as it is unsound. In the brief that it filed with the Michigan Supreme Court, Petitioner flatly asserted that "**[t]he federal Compact Clause is . . . inapplicable.**" (TOMAC's Michigan Supreme Court Brief, p. 38; App., 121a; bold in original.)

[5] Petitioner admitted this point in the brief that it filed with the Michigan Supreme Court: "**IGRA does not determine how a compact is approved.**" (TOMAC's Michigan Supreme Court Brief, p. 38; App., 120a; bold in original.)

recognized that the means by which a state binds itself to an IGRA compact are determined by *state* law. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). The Michigan Supreme Court determined that the Michigan legislature's use of a resolution to bind the State to the compacts was authorized by the law of Michigan. While that decision has considerable significance to the State of Michigan, its citizens and the tribes occupying land within the State's borders, it has no national application.

Finally, Petitioner argues that the federal issue for which it seeks review has national significance "based purely on socioeconomic considerations[.]" (Petition, p. 17.) According to Petitioner, such considerations are that the "tribal gaming industry" has experienced "stratospheric growth" at the price of "high societal costs" (Petition, pp. 18, 19.) However much Petitioner may decry the socio-economic consequences of tribal gaming, the proffered federal legal issue has nothing to do with them. Indeed, there is minimal federal interest in the specific resolution of policy questions such as the growth and cost of tribal gaming. Congress left those matters to be decided on a local level through the compacting process between the states and the tribes. *See Pueblo of Santa Ana,* 104 F.3d at 1554, quoting S. Rep. No. 100-446 at 13 *reprinted in* 1988 U.S.C.C.A. at 3083 ("the compact process is a viable mechanism for setting various matters between two equal sovereigns. . ."). Review of those decisions is beyond the realm of the federal courts. *Gaming Corp. of America v. Dorsey & Whitney*, 86 F.3d 536, 546-547 (8th Cir. 1996) ("Congress thus chose not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis.").

IV. The Michigan Supreme Court's Decision is Correct on the Merits.

Petitioner attacks the merits of the Michigan Supreme Court's interpretation of IGRA and challenges that court's decision on the state constitutional question. These arguments say nothing about whether this Court should grant a writ of certiorari. As shown earlier in this brief, the state court's view on the federal issue did not form the basis of its decision on the state constitutional issue, which has an independent and adequate state ground. Moreover, the state court's resolution of the state constitutional question is clearly not subject to this Court's review. Nevertheless, the State will address the Petitioner's challenges on the merits. They are, as shown below, entirely defective.

First, Petitioner contends that the decision below incorrectly interpreted 18 U.S.C. § 1166. The Michigan Supreme Court, however, properly construed the clear language of the federal statute. Section 1166 provides, in part, as follows:

> (a) Subject to subsection (c)[pertaining to class III gaming under a tribal-state compact], *for purposes of Federal law*, all State laws pertaining to the licensing, regulation, prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and the same extent as such laws apply elsewhere in the State.

18 U.S.C. § 1166(a)(emphasis supplied).

The Michigan Supreme Court interpreted this language to mean that "Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather, it simply incorporates

state laws as the federal law governing nonconforming tribal gaming. Thus, although a state's gaming laws apply in the absence of a tribal-state compact, they apply only *as federal law*." *TOMAC*, 471 Mich. at 322-323; 685 N.W.2d at 229 (emphasis in original).

Petitioner complains that this interpretation of Section 1166 as "federalizing" or "borrowing" state gaming laws in the absence of a compact "cannot be reconciled with the plain language of the statute[.]" (Petition, p. 25.) But Section 1166(a)'s language plainly says that state gaming laws are applicable in Indian country "for purposes of *Federal* law[.]" (Emphasis supplied.) Petitioner completely ignores this important qualifying language. Petitioner also fails to point out that the Michigan court is not alone in its interpretation of Section 1166(a). The Tenth Circuit has held that this provision "incorporates state laws as the federal law governing all non-conforming gambling in Indian country." *United Keetoowah Bank of Cherokee Indians,* 927 F.2d at 1177. Moreover, this interpretation of Section 1166(a) is supported by subsection (c) of the statute. That provision leaves it entirely to the federal government to enforce state criminal gaming laws in Indian country. "The *United States shall have exclusive jurisdiction* over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country[.]" 18 U.S.C. § 1166(c)(emphasis supplied). Thus, the "power to enforce these newly incorporated laws rests solely with the United States[.]" *United Keetoowah Band,* 927 F.2d at 1177.

The Michigan Supreme Court's interpretation of Section 1166 as borrowing state gaming laws as the federal law applicable in Indian country gives effect to the express language of the statute. There is no need for this Court to review it.

Second, Petitioner argues that the compacting process "ensured state regulatory and policy making power regarding Indian gaming[.]" (Petition, p. 22.) This is an exaggeration of the rights granted to the states in that process. Petitioner points to 25 U.S.C. §§ 2710(d)(3)(c) and 2710(d)(5) as examples of such transfers of power to a state. But they do not serve that function; rather, they are examples of terms that *may* be included in a tribal-state gaming compact. While Petitioner may believe that an "appropriate" IGRA compact "will" apply state regulatory law to Indian gaming (Petition, p. 22), nothing in the statute betrays any such congressional judgment. Indeed, IGRA presumes that the tribe will regulate its own gaming operation. "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5) (emphasis supplied). The Michigan Compacts retained the tribes' exclusive regulatory jurisdiction, leaving the State with no such authority. (Michigan Compacts, § 4(M)(1); App., 14a).

Third, Petitioner argues that the Michigan Compacts are legislation "because they set forth an extensive regulatory framework governing tribal gaming activities." (Petition, p. 23). Here, Petitioner merely reargues its position below that the Michigan Compacts are "legislation" under the Michigan constitution. For good reasons, the Michigan Supreme Court soundly rejected Petitioner's arguments. The court found the "regulatory framework" described in the Michigan Compacts was one that does "not create any state agencies or impose any regulatory obligation on the state." *TOMAC*, 471 Mich. at 326; 685 N.W.2d at 230. It concluded that the age restrictions for gaming and employment "are not restrictions on the citizens of Michigan; rather, they were

restrictions only on the *tribes*." *Id.*, 471 Mich. at 325-326; 685 N.W.2d at 230 (emphasis in original). The court rejected Petitioner's argument that the Michigan Compacts impose an obligation on local governmental units to create local revenue sharing boards to receive and distribute the tribal payments; instead the court found that, under Michigan law, local governments are "third-party beneficiaries of the compacts, with the creation of the revenue sharing boards simply a condition precedent to receiving those benefits." *TOMAC*, 471 Mich. at 325; 685 N.W.2d at 230.

Petitioner's arguments that the substantive terms of the Michigan Compacts make them "legislation" are not only wrong—the Michigan Supreme Court's rejection of those arguments has nothing to do with Petitioner's federal question. The court simply interpreted the same compact language differently than Petitioner. Where Petitioner saw an age restriction on Michigan citizens, the court saw a restriction assumed by the tribes as a matter of contract. Where Petitioner saw an obligation on local governments to create local boards to receive tribal payments, the court saw a condition precedent to receiving the tribal revenue. Surely, the Michigan Supreme Court's interpretation of specific compact provisions as contract terms, rather than "legislation," implicates no federal issue.

Finally, Petitioner says that the Michigan Compacts are "legislation" under Michigan law because they make "multiple policy-making decisions. . . ." (Petition, p. 24, quoting dissent of Markman, J.). This argument was also soundly rejected by the Michigan Supreme Court. In this case, the policy decisions underlying the Michigan Compacts were made by the Michigan legislature when it approved those compacts by resolution. But, under Michigan constitutional law, "it must be remembered that not all policy

decisions made by the Legislature are required to be in the form of legislation." *TOMAC*, 471 Mich. at 331-332; 685 N.W.2d at 233. The court then quoted the following passage from this Court's decision in *Yakus v. United States*, 321 U.S. 414, 424 (1944): "[t]he essentials of the legislative function are the determination of legislative policy *and its formulation and promulgation as a defined and binding rule of conduct. . . .*" *TOMAC*, 471 Mich. at 332; 685 N.W.2d at 233 (emphasis by the court). The Michigan Supreme Court correctly concluded that HCR 115 did not meet that test because it "neither promulgated a legislative policy as a defined and binding rule of conduct nor applied it to the general community." *TOMAC*, 471 Mich. at 332; 685 N.W.2d at 233. Consequently, the fact that the Michigan Compacts reflected policy decisions did not render them "legislation" under Michigan law.[6]

---

[6] Nothing suggests that this conclusion was affected by the Michigan court's resolution of Petitioner's federal question. The Michigan Supreme Court's citation of *Yakus* does not alter this fact. The court cited *Yakus* not for any governing federal law, but for its illuminating statement of the role played by policy decisions in the law-making function.

CONCLUSION

For the foregoing reasons, Respondent State of Michigan requests that this Court deny the Petition for a Writ of Certiorari to the Michigan Supreme Court.

Respectfully submitted,

EUGENE DRIKER
Counsel of Record
THOMAS F. CAVALIER
BARRIS, SOTT, DENN
& DRIKER, PLLC
211 West Fort Street, 15th Floor
Detroit, MI 48226-3281
(313) 965-9725
Counsel for Respondents

December 30, 2004

APPENDIX A

MICHIGAN GAMING CONTROL BOARD

Tribal-State Compact Agreement

1998

NOTTAWASEPPI HURON POTAWATOMI

COMPACT BETWEEN
THE NOTTAWASEPPI HURON BAND OF
POTAWATOMI AND
THE STATE OF MICHIGAN
PROVIDING FOR THE CONDUCT OF
TRIBAL CLASS III GAMING BY THE
NOTTAWASEPPI HURON TRIBE OF POTAWATOMI

THIS COMPACT is made and entered into this 3rd day of Dec., 1998, by and between the NOTTAWASEPPI HURON BAND OF POTAWATOMI (hereinafter referred to as "Tribe") and the STATE OF MICHIGAN (hereinafter referred to as "State").

RECITALS

WHEREAS, the State of Michigan is a sovereign State of the United States of America, having been admitted to the Union pursuant to the Act of January 26, ch. 6, 1837, 5 Stat. 144 and is authorized by its constitution to enter into contracts and agreements, including this agreement with the Tribe; and

WHEREAS, the Tribe is a federally recognized Indian Tribe under 25 C.F.R. 83 as of December 19, 1995, and its governing body, the Tribal Council, is authorized by the tribal constitution to enter into contracts and agreements of every description, including this agreement with the State; and

WHEREAS, the Congress of the United States has enacted the Indian Gaming Regulatory Act of 1988 (25 U.S.C. 2701 et seq. (hereinafter "IGRA"), which permits Indian tribes to operate Class III gaming activities on Indian reservations pursuant to a tribal-state Compact entered into for that purpose; and

WHEREAS, the Tribe proposes to operate a Class III gaming establishment on eligible Indian lands in the State of Michigan, and by Tribal Council Resolution and Tribal Ordinance will adopt rules and regulations governing the games played and related activities at the Class III gaming establishment; and

WHEREAS, the State presently permits and regulates various types of gaming within the State (but outside Indian lands), including casino style charitable gaming such as craps, roulette, and banking card games, as well as a lottery operating instant scratch games, and "pick number" games, and Multi-state lotto, most of which would be Class III games if conducted by the Tribe; and

WHEREAS, the Michigan Supreme Court in *Automatic Music & Vending Corp. v. Liquor Control Comm.*, 426 Mich. 452, 396 N.W. 2d 204 (1986), *appeal dismissed* 481 U.S. 1009 (1987), and the Michigan Court of Appeals in *Primages Int'l of Michigan v. Michigan*, 199 Mich App 252, 501 NW 2d 268 (1993), have held that the statutory exception found at MCL 750.303(2) allows for the play of electronic gaming

devices, which includes computerized or electronic games of chance, albeit subject to specified restrictions regarding the mode of play; and

WHEREAS, said casino style table games and electronic gaming devices are therefore permitted "for any purpose by any person, organization or entity," within the meaning of IGRA, 25 U.S.C. 2710(d)(1)(B); and

WHEREAS, at the general election held on November 5, 1996, the electors adopted in initiated law which provides for a licensing and regulatory system under which casino gambling may be operated in the City of Detroit; and

WHEREAS, the State and seven (7) other federally-recognized Indian tribes in the State have previously entered into substantially similar Compacts for the conduct of Class III games; and

WHEREAS, a Compact between the Tribe and the State for the conduct of Class III gaming satisfies the prerequisite imposed by the United States Congress by enactment of IGRA for the operations of lawful Class III gaming by the Tribe on eligible Indian lands in Michigan; and

WHEREAS, the State and the Tribe, in recognition of the sovereign rights of each party and in a spirit of cooperation in the interests of the citizens of the State and the members of the Tribe, have engaged in good faith negotiations recognizing and respecting the interests of each party and have agreed to this Compact.

NOW, THEREFORE, the Tribe and the State agree as follows:

SECTION 1. Purpose and Objectives

The purpose and objectives of the Tribe and State in making this Compact are as follows:

(A) To demonstrate good will and a cooperative spirit between the State and the Tribe;

(B) To continue the development of effective working relationships between State and Tribal governments;

(C) To compact for Class III gaming on eligible Indian lands of the Tribe in Michigan as authorized by IGRA;

(D) To fulfill the purpose and intent of IGRA by providing for tribal gaming as a means of generating tribal revenues, thereby promoting tribal economic development, tribal self-sufficiency and strong tribal government;

(E) To provide tribal revenues to fund tribal government operations or programs, to provide for the general welfare of the Tribe and its members and for other purposes allowed under IGRA;

(F) To provide for the operations of Class III gaming in which, except as provided in 25 U.S.C. 2710(b)(4) and (d)(2)(A) of IGRA, the Tribe shall have the sole proprietary interest and be the primary beneficiary of the Tribe's gaming enterprise;

(G) To recognize the State's interest in the establishment by the Tribe of rules for the regulation of Class III Gaming operated by the Tribe on eligible Indian lands;

(H) To recognize the State's interest in the establishment by the Tribe of rules and procedures for ensuring that Class III gaming is conducted fairly and honestly by the owners, operators, and employees and by the patrons of any Class III gaming enterprise of the Tribe; and

(I) To establish procedures to notify the patrons of the Tribe's Class III gaming establishment that the establishment is not regulated by the State of Michigan and that patrons must look to the tribal government or to the federal government to resolve any issues or disputes with respect to the operations of the establishment.

SECTION 2. Definitions

For purposes of this Compact, the following definitions pertain:

(A) "Class III gaming" means all forms of gaming authorized by this Compact, which are neither Class I nor Class II gaming, as such terms are defined in 2703(6) and (7) of IGRA. Only those Class III games authorized by this Compact may be played by the Tribe.

(B) (1) "Eligible Indian lands" means trust and land reservations acquired within Calhoun County, Michigan. A total of one (1) tribal Class III gaming facility may be located on eligible Indian lands; provided, however, if any tribe which attains federal recognition subsequent to the date of this Compact is granted the right, under a valid Compact with the State of Michigan, to operate more than one (1) Class III gaming facility on its Indian lands, the Tribe shall be afforded the same right subject to the same terms and conditions imposed on such newly recognized tribe.

(2) Nothing in this subsection 2(B) shall be construed to limit the Tribe's ability to change the location of the Tribe's Class III gaming facility within "eligible Indian lands".

(C) "Tribal Chairperson" means the duly elected Chairperson of the Board of Directors or Tribal Council of the Tribe.

(D) "Person" means a business, individual, proprietorship, firm, partnership, joint venture, syndicate, trust, labor organization, company, corporation, association, committee, state, local government, government instrumentality or entity, or any other organization or group of persons acting jointly.

SECTION 3. Authorized Class III Games

(A) The Tribe may lawfully conduct the following Class III games on eligible Indian lands:

(1) Craps and related dice games;

(2) Wheel games, including "Big Wheel" and related games;

(3) Roulette;

(4) Banking card games that are not otherwise treated as Class II gaming in Michigan pursuant to 25 U.S.C. 2703(7)(C), and non-banking card games played by any Michigan tribe on or before May 1, 1988;

(5) Electronic games of chance featuring coin drop and payout as well as printed tabulations whereby the software of the device predetermines the presence or lack of a winning combination and payout. Electronic games of chance are defined as a microprocessor-controlled electronic device which allows a player to play games of chance, which may be affected by an element of skill, activated by the insertion of a coin or currency, or by the use of a credit, and awards game credits, cash, tokens, or replays, or a written statement of the player's accumulated credits, which written statements are redeemable for cash; and

(6) Keno;

(7) Any other Class III game that lawfully may be operated by a person licensed to operate a casino pursuant to the Initiated Law of 1996, MCL 432.201 et seq.; and

(8) Games that lawfully may be conducted pursuant to MCL 750.303a and MCL 750.310a.

This Compact shall apply to card games that are considered to be Class II games pursuant to 25 U.S.C. 2703(7)(C) only if those games are expanded beyond their "nature and scope" as it existed before May 1, 1988 and only to the extent of such expansion. The term "nature and scope" shall be interpreted consistent with IGRA, the legislative history of IGRA, any applicable decisions of the courts of the

United States and any applicable regulations of the National Indian Gaming Commission.

Any limitations on the number of games operated or played, their location within eligible Indian lands as defined under this Compact, hours or period of operation, limits on wages, or pot size, or other such limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact.

(B) Additional Class III games may be lawfully conducted by mutual agreement of the Tribe and the State as follows:

(1) The Tribe shall request additional games by letter from the tribal Chairperson on behalf of the Tribe to the Governor on behalf of the State. The request shall identify the additional proposed gaming activities with specificity and any proposed amendments to the Tribe's regulatory ordinance.

(2) The State acting through the Governor shall take action on the Tribe's request within ninety (90) days after receipt. The Governor's actions shall be based on:

(a) Whether the proposed gaming activities are permitted in the State of Michigan for any purpose by any person, organization or entity; and

(b) Whether the provisions of this Compact are adequate to fulfill the policies and purposes set forth in the IGRA with respect to such additional games.

SECTION 4. Regulation of Class III Gaming

(A) Prior to permitting the initiation of any Class III gaming on eligible Indian lands, the Tribe will enact a comprehensive gaming regulatory ordinance governing all aspects of the Tribe's gaming enterprise. The requirements of this Section 4 are intended to supplement, rather than conflict with the provisions of the Tribe's ordinance. To the extent any regulatory requirement of this Compact is more stringent or restrictive than a parallel provision of the Tribe's ordinance, as now or hereafter amended, this Compact shall control.

(B) The regulatory requirements of this Section 4 shall apply to the conduct of all Class III gaming authorized by the Compact. At all times during which it conducts any Class III gaming under this Compact, the Tribe shall maintain, as part of its lawfully enacted ordinances, requirements at least as restrictive as those set forth herein.

(C) The Tribe shall license, operate, and regulate all Class III gaming activities pursuant to this Compact, tribal law, IGRA, and all other applicable federal law. This shall include but not be limited to the licensing of consultants (except legal counsel with a contract approved under 25 U.S.C. 81 and/or 476), primary management officials, and key officials of each Class III gaming activity or operation. Any violations of this Compact, tribal law, IGRA, or other

applicable federal law shall be corrected immediately by the Tribe.

(D) The Tribe may not license, hire, or employ as a key employee or primary management official, as those terms are defined at 25 C.F.R. 502.14 and 502.19, in connection with Class III gaming, any person who:

(1) Is under the age of 18; or

(2) Has been convicted of or entered a plea of guilty or no contest to a gambling related offense, fraud or misrepresentation; or

(3) Has been convicted of or entered a plea of guilty or no contest, to any offense not specified in subparagraph (2) within the immediately preceding five years; this provision shall not apply if that person has been pardoned by the Governor of the State where the conviction occurred or, if a tribal member, has been determined by the Tribe to be a person who is not likely again to engage in any offensive or criminal course of conduct and the public good does not require that the applicant be denied a license as a key employee or primary management official; or

(4) Is determined by the Tribe to have participated in organized crime or unlawful gambling or whose prior activities, criminal records, reputation, habits, and/or associations pose a threat to the public interest or to the effective regulation and

control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental to the conduct of gaming.

(E) The terms "fraud or misrepresentation," as used in subsection (d)(2), shall mean a criminal offense committed in Michigan or any other jurisdiction, involving, theft, fraud or misrepresentation, which is a felony or would be a felony if committed in Michigan, and which was committed as an adult or prosecuted as an adult offense, and which has not been effectively removed from the employee's criminal record by executive pardon, state court order, or operation of law.

(F) The term "any offense," as used in subsection (D)(3), shall mean any criminal offense not described in subsection (D)(2), whether committed in this state or any other jurisdiction, that is, or would be, a crime under the provisions of the Michigan Penal Code, Act No. 328 of the Public Acts of 1931, as amended, being MCL 750.1 to 750.568, or the controlled substance provisions of the Public Health Code, Act No. 368 of the Public Acts of 1978, as amended, being MCL 333.7101 to 333.7545, or any other criminal offense not specified in subparagraph (2) involving theft, dishonesty, fraud or misrepresentation arising under the law of Michigan or another state or jurisdiction, that was committed as an adult or prosecuted as an adult offense, and which has not been effectively removed from the employee's criminal record by executive pardon, state court order, or operation of law.

(G) All management contracts entered into by the Tribe regarding its gaming enterprise operated pursuant to this

Compact shall conform to all the requirements of IGRA, including 25 U.S.C. 2711, and tribal law, if the Tribe enters into a management contract for the operation of any Class III gaming or component thereof, the State shall be given fourteen (14) days prior written notice of such contract.

(H) All accounting records shall be kept on a double entry system of accounting, maintaining detailed, supporting, subsidiary, records. The Tribe shall maintain the following records for not less than three (3) years:

(1) Revenues, expenses, assets, liabilities and equity for the location at which Class III gaming is conducted;

(2) Daily cash transactions for each Class III game at the location at which gaming is conducted, including but not limited to transactions relating to each gaming table bank, game drop box and gaming room bank;

(3) All markers, IOUs, returned checks, hold checks or other similar credit instruments;

(4) Individual and statistical game records (except for card games) to reflect statistical drop and statistical win; for electronic, computer, or other technologically assisted games, analytic reports which show the total amount of cash wagered and the total amount of prizes won;

(5) Contracts, correspondence and other transaction documents relating to all vendors and contractors;

(6) Records of all tribal gaming enforcement activities;

(7) Audits prepared by or on behalf of the Tribe; and

(8) Personnel information on all Class III gaming employees or agents, including rotation sheets, hours worked, employee profiles and background checks.

(I) No person under the age of 18 may participate in any Class III game.

(J) The Tribe shall not conduct any Class III gaming outside of eligible Indian lands.

(K) The rules of each Class III card game shall be posted in a prominent place in each card room and must designate:

(1) The maximum rake-off percentage, time buy-in or other fee charged;

(2) The number of raises allowed;

(3) The monetary limit of each raise;

(4) The amount of ante; and

(5) Other rules as may be necessary.

(L) Upon the request of the State, the Tribe will provide to the State the background information compiled by the Tribe on all consultants (except legal counsel), management personnel, suppliers and employees required to licensed under 25 C.F.R. Part 556 or the Tribes gaming ordinance to allow the State to verify the Tribe's background information and to make an independent determination as to suitability of these individuals, consistent with the standards set forth in Section 4 (D) herein.

(M) The regulatory requirements set forth in this section of this Compact shall be administered and enforced as follows:

(1) The Tribe shall have responsibility to administer and enforce the regulatory requirements.

(2) A representative authorized in writing by the Governor of the State shall have the following right to inspect all tribal Class III gaming facilities and all tribal records related to Class III gaming, including those records set forth in Section 4(H) herein, subject to the following conditions:

(a) With respect to public areas, at any time without prior notice;

(b) With respect to private areas not accessible to the public, at any time during normal business hours, with 12 hours prior written notice; and

(c) With respect to inspection and copying of all tribal records relating to Class IiI gaming, with 48 hours prior written notice, not including weekends.

(3) Except as otherwise provided by law or as also allowed by the exception defined below, the State agrees to maintain in confidence and never to disclose to any third party any financial information, proprietary ideas, plans, methods, data, development, inventions or other proprietary information regarding the gambling enterprise of the Tribe, games conducted by the Tribe, or the operation thereof which is provided to the State by the Tribe without the prior written approval of the duly authorized representative of the Tribe, provided that the information is marked as confidential information when received by the State. Nothing contained in this Section 4(M)(3) shall be construed to prohibit:

(a) The furnishing of any information to a law enforcement or regulatory agency of the United States or State government pursuant to a lawful request of such agency;

(b) The State from making known the names of persons, firms or corporations conducting Class III gaming activities pursuant to the terms of this Compact, locations at which such activities are conducted or the

dates on which such activities are conducted;

(c) Publishing the terms of this Compact;

(d) Disclosing information as necessary to audit, investigate, prosecute or arbitrate violations of this Compact;

(e) Complying with any law, subpoena or court order. The State shall immediately notify the Tribe of any request or demand for the release of confidential information under this subsection 4(M)(3) to allow the Tribe to initiate proceedings under Section 7 of this Compact or other applicable law to resolve any dispute regarding the State's intention to disclose such information.

(4) The Tribe shall have the right to inspect State records concerning all Class III gaming conducted by the Tribe consistent with Michigan's Freedom of Information Act.

(5) The Tribe shall reimburse the State for the actual costs the State incurs in carrying out any functions authorized by the terms of this Compact, in an amount not to exceed fifty thousand dollars ($50,000.00) per annum, adjusted annually in accordance with the Consumer Price index (CPI) annual inflation index. All calculations of amounts due shall be based upon a fiscal year beginning October 1

and ending September 30, unless the parties select a different fiscal year. Payments due the State shall be made no later than sixty (60) days after the beginning of each fiscal year. Payments due the State during any partial fiscal year this Compact is in effect shall be adjusted to reflect only that portion of the fiscal year. Within sixty (60) days after each fiscal year in which this Compact is in effect, the State shall submit to the Tribe an accounting of actual costs incurred in carrying out any functions authorized by the terms of this Compact. Any amount of said sums paid to the State which are not expended by the State on said actual costs shall be returned to the Tribe by the State, within sixty (60) days after the fiscal year or treated as a pre-payment of the Tribe's obligation during the subsequent fiscal year.

(6) In the event the State believes that the Tribe is not administering and enforcing the regulatory requirements set forth herein, it may invoke the procedures set forth in Section 7 of this Compact.

(N) The Tribe shall comply with all applicable provisions of the Bank Secrecy Act, F.L. 91-508, October 26, 1970, 31 U.S.C. 5311-5314.

SECTION 5. Employee Benefits

(A) The Tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated pursuant to this Compact, such benefits to which the employee would be entitled by virtue of the Michigan Employment Security Act (Michigan Public Act No. 1 of 1938, as amended, being MCL 421.1 et seq.), and the Worker's Disability Compensation Act of 1969, (Michigan Public Act

No. 317 of 1969, as amended, being MCL 481.101 et seq.) If his or her employment services were provided to an employer engaged in a business enterprise which is subject to, and covered by, the respective Public Acts.

SECTION 6. Providers of Class III Gaming Equipment or Supplies.

(A) No Class III games of chance, gaming equipment or supplies may be purchased, leased or otherwise acquired by the Tribe unless the Class III equipment or supplies meet the technical equipment standards of either the State of Nevada or the State of New Jersey.

(B) Prior to entering into any lease or purchase agreement, the Tribe shall obtain sufficient information and identification from the proposed seller or lessor and all persons holding any direct or indirect financial interest in the lessor or the lease/purchase agreement or permit the Tribe to conduct a background check on those persons. The Tribe shall not enter into any lease or purchase agreement for Class III gaming equipment or supplies with any person or entity if the lessor, seller, or any manager or person holding direct or indirect financial interest in the lessor/seller or the proposed lease/purchase agreement, is determined to have participated in or have involvement with organized crime or has been convicted of or entered a plea of guilty or no contest to a gambling-related offense, fraud or misrepresentation, or has been convicted of or entered a pleas of guilty or no contest to any other felony offense within the immediately proceeding five years, unless that person has been pardoned.

(C) The seller, lessor, manufacturer, or distributor shall provide, assemble and install all Class III games of

chance, gaming equipment, and supplies in a manner approved and licensed by the Tribe.

SECTION 7. Dispute Resolution

(A) In the event either party believes that the other party has failed to comply with or has otherwise breached any provision of this Compact, such party may invoke the following procedure:

(1) The party asserting noncompliance shall serve written notice on the other party. The notice shall identify the specific Compact provision alleged to have been violated and shall specify the factual and legal basis for the alleged noncompliance. The notice shall specifically identify the type of game or games, their location, and the date and time of the alleged noncompliance. Representatives of the State and Tribe shall thereafter meet within thirty (30) days in an effort to resolve the dispute.

(2) In the event an allegation by the State is not resolved to the satisfaction of the State within ninety (90) days after service of the notice set forth in Section 7(A)(1), the party may serve upon the office of the tribal Chairperson a notice to cease conduct of the particular game(s) or activities alleged by the State to be in noncompliance. Upon receipt of such notice, the Tribe may elect to stop the game(s) or activities pending the results of arbitration. The Tribe shall act upon one of the foregoing options within thirty (30) days of receipt of notice from the State. Any arbitration under

this authority shall be conducted under the Commercial Arbitration rules of the American Arbitration Association except that the arbitrators shall be attorneys who are licensed members of the State Bar of Michigan, or of the bar of another state, in good standing, and will be selected by the State picking one arbitrator, the Tribe a second arbitrator, and the two so chosen shall pick a third arbitrator. If the third arbitrator is not chosen in this manner within ten (10) days after the second arbitrator is picked, the third arbitrator will be chosen in accordance with the rules of the American Arbitrator Association. In the event an allegation by the Tribe is not resolved to the satisfaction of the Tribe within ninety (90) days after service of the notice set forth in Section 7(A)(1), the Tribe may invoke arbitration as specified above.

(3) All parties shall bear their own costs of arbitration and attorney fees.

(B) Nothing in Section 7(A) shall be construed to waive, limit or restrict any remedy which is otherwise available to either party to enforce or resolve disputes concerning the provisions of this Compact. Nothing in this Compact shall be deemed a waiver of Tribe's sovereign immunity. Nothing in this Compact shall be deemed a waiver of the State's sovereign immunity.

SECTION 8. Notice to Patrons.

In the facility of the Tribe where Class III gaming is conducted, the Tribe shall post in a prominent position a

Notice to patrons at least two (2) feet by three (3) feet in dimension with the following language:

NOTICE

THIS FACILITY IS REGULATED BY ONE OR MORE OF THE FOLLOWING: THE NATIONAL INDIAN GAMING COMMISSION, BUREAU OF INDIAN AFFAIRS OF THE U.S. DEPARTMENT OF THE INTERIOR AND THE GOVERNMENT OF THE NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS.

THIS FACILITY IS NOT REGULATED BY THE STATE OF MICHIGAN.

SECTION 9. Gaming Outside of Eligible Indian Lands.

An application to take land in trust for gaming purposes outside of eligible Indian lands, as defined in Section 2(B) of this Compact, shall not be submitted to the Secretary of the Interior in the absence of a prior written agreement between the Tribe and the State's other federally recognized Indian Tribes that provides for each of the other Tribes to share in the revenue of any gaming facility that is the subject of the application to take lands in trust for gaming purposes outside of eligible Indian lands.

SECTION 10. Regulation of the Sale of Alcoholic Beverages.

(A) The Tribe hereby adopts and applies to its Class III gaming establishment as tribal law those State laws, as amended, relating to the sale and regulation of alcoholic beverages encompassing the following areas; sale to a minor; sale to a visibly intoxicated individual; sale of adulterated or

misbranded liquor; hours of operation; and similar substantive provisions. Said tribal laws, which are defined by reference to the substantive areas of State laws referred to above, shall apply to the tribal Class III gaming establishment in the same manner and to the same extent as such laws apply elsewhere in the State to off-reservation transactions.

(B) The Tribe, for resale at its Class III gaming establishment, shall purchase spirits from the Michigan Liquor Control Commission, and beer and wine from distributors licensed by the Michigan Liquor Control Commission, at the same price and on the same basis that such beverages are purchased by Class C licensees.

SECTION 11. Effective Date.

This Compact shall be effective immediately upon:

(A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;

(B) Endorsement by the Governor of the State of Michigan and concurrence in that endorsement by resolution of the Michigan Legislature;

(C) Approval by the Secretary of the Interior of the United States; and

(D) Publication in the Federal Register.

SECTION 12. Binding Effect, Duration, and Severability.

(A) This Compact shall be binding upon the State and the Tribe for a term of twenty (20) years from the date it

becomes effective unless modified or terminated by written agreement of both parties.

(B) At least one year prior to the expiration of twenty (20) years after the Compact becomes effective, and thereafter at least one year prior to the expiration of each subsequent five (5) year period, either party may serve written notice on the other of its right to renegotiate this Compact. The parties agree that 25 U.S.C. 2710 (d) (3) through (8), or any successor provisions of law, apply to successor Compacts.

(C) In the event that either party gives written notice to the other of its right to renegotiate this Compact pursuant to Section 12, subsection (B), the Tribe may, pursuant to the procedures of IGRA, request the State to enter into negotiations for a successor Compact governing the conduct of Class III gaming activities. If the parties are unable to conclude a successor Compact, this Compact shall remain in full force and effect pending exhaustion the administrative and judicial remedies set forth in IGRA, and/or any other applicable federal law.

(D) The Tribe may operate Class III gaming only while this Compact or any renegotiated Compact is in effect.

(E) In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of the Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact.

SECTION 13. Notice to Parties.

Unless otherwise indicated, all notices, payments, requests, reports, information or demands which any party hereto may desire or may be required to give to the other party hereto, shall be in writing and shall be personally delivered or sent by first-class, certified or registered United States Mail, postage prepaid, return appearing below or such other address as any party shall hereinafter inform the other party hereto by written notice given as aforesaid:

Notice to the Tribe shall be sent to:

Chairperson
Nottawaseppi Huron Band of Potawatomi
2221 1-1/2 Mile Road
Fulton, MI 49052

Notice to the State shall be sent to:

Governor's Office
State of Michigan
P.O. Box 30013
Lansing, MI 48909

Office of Attorney General
Treasury Building
First Floor
Lansing, MI 48922

Every notice, payment, request, report, information or demand so given shall be deemed effective upon receipt, or if mailed, upon receipt or the expiration of the third day following the day of mailing, whichever occurs first, except that any notice of change of address shall be effective only upon receipt by the party to whom said notice is addressed.

SECTION 14. Entire Agreement.

This Compact is the entire agreement between the parties and supersedes all prior agreements, whether written or oral, with respect to the subject matter hereof. Neither this Compact not any provision herein may be change, waived, discharged, or terminated orally, but only by an instrument in writing signed by the Tribe and the State.

SECTION 15. Filing of Compact with Secretary of State.

Upon the effective date of this Compact, a certified copy shall be filed by the Governor with the Michigan Secretary of State and a copy shall be transmitted to each house of the Michigan State Legislature and the Michigan Attorney General. Any subsequent amendment or modification of this Compact shall be filed with the Michigan Secretary of State.

SECTION 16. Amendment

This Compact may be amended by mutual agreement between the Tribe and the State as follows:

(A) The Tribe or the State may propose amendments to the Compact by providing the other party with written notice of the proposed amendments as follows:

(I) The Tribe shall propose amendments pursuant to the notice provisions of this Compact by submitting the proposed amendments to the Governor who shall act for the State.

(ii) The State, acting through the Governor, shall propose amendments by submitting

the proposed amendments to the Tribe pursuant to the notice provisions of this Compact.

(iii) Neither the tribe nor the state may amend the definition of "eligible Indian lands" to include counties other than those set forth in Section 2(B)(1) of this Compact. The tribe's right to conduct gaming under this Compact shall be terminated if any of the following events occur:

(I) the tribe applies to the United States Department of the Interior to have land taken into trust which would qualify for gaming under Section 20 of the IGRA (25 U.S.C. Section 2719) and which is within 150 miles of the City of Detroit, other than eligible Indian lands described in Section 2(B)(1) of this Compact,

(II) the tribe requests the United States Department of the Interior to approve a Compact for gaming within 150 miles of the City of Detroit which Compact has not been executed by the State of Michigan, or

(III) the Tribe conducts gaming on land within 150 miles of the City of Detroit, other than eligible Indian

lands described in Section 2(B)(I) of this Compact,

Termination of tribal gaming under this Section shall be effective as of the date on which the State learns or receives notice of any tribal action identified in this Paragraph 16(A)(iii), including notice from any person or entity (including any unit of government) which is given to the addresees identified at Section 13 of this Compact.

(B) The party receiving the proposed amendment shall advise the requesting party within thirty (30) days as follows:

(1) That the receiving party agrees to the proposed amendment; or

(2) That the receiving party rejects the proposed amendment as submitted and agrees to meet concerning the subject of the proposed amendment.

(C) Any amendment agreed to between the parties shall be submitted to the Secretary of the Interior for approval pursuant to the provisions of the IGRA.

(D) Upon the effective date of the amendment, a certified copy shall be filed by the Governor with the Michigan Secretary of State and copy shall be transmitted to each house of the Michigan Legislature and the Michigan Attorney General.

SECTION 17. Tribal Payments to State for Economic Benefits of Exclusivity.

(A) The State and the Tribe have determined that it is in the interests of the people of the State and the members of the Tribe to maximize the economic benefits of Class III gaming for the Tribe and to minimize the adverse effects of Class III gaming by providing a mechanism to reduce the proliferation of Class III gaming enterprises in the State in exchange for the Tribe providing important revenue to the State.

(B) So long as there is a binding Class III Compact in effect between the State and Tribe and no change in State law is enacted which is intended to permit or permits the operation of electronic games of chance or commercial casino games by any other person (except a person operating such games in the City of Detroit pursuant to the Initiated Law of 1996, M.C.L. 432.201 *et. seq.*) And no other person (except a federally-recognized Indian Tribe operating pursuant to a valid Compact under IGRA or a person operating in the City of Detroit pursuant to the Initiated Law of 1996, M.C.L. 432.201) within the State lawfully operates electronic games of chance or commercial casino games, the Tribe shall make payments to the State as provided in subsection (C).

(C) From and after the effective date of this Compact (as determined pursuant to Section 11 of this Compact), and so long as the conditions set forth in subsection (B) remain in effect, the Tribe will make semi-annual payments to the State as follows:

(i) Payment to the Michigan Strategic Fund, or its successor as determined by State law, in amount equal to eight percent (8%) of the net win at the casino derived from

all Class III electronic games of chance, as those games are defined in the Compact.

(ii) As used in this subsection, "net win" means the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines.

(iii) For purposes of these payments, all calculations of amount due shall be based upon a fiscal year beginning October 1 and ending September 30 of the following calendar year, unless the parties agree on a different fiscal year, and all payments due the State pursuant to the terms of this section shall be paid no later than sixty (60) days after October 1 and March 31 of each year. Any payments due and owing from the Tribe in the year this Compact is approved, or the final year the Compact is in force, shall reflect the actual net win but only for the portion of the year the Compact is in effect.

(D) The operation of electronic games of chance by persons or entities other than federally-recognized Indian tribes pursuant to a valid Compact under IGRA or not authorized for gaming under Proposal E shall not violate the tribes exclusive right to operate such machines so long as such machines:

(1) Reward a player only with the right to replay the device at no additional costs;

(2) Do not permit the accumulation of more than fifteen (15) replays at any one time;

(3) Allow the accumulated free replays to be discharged only by activating the device for one additional play for each accumulated free replay; and

(4) Make no permanent record, directly or indirectly, of the free replays awarded.

SECTION 18 Tribal Payments to Legal Governments.

(A) From and after effective date of this Compact (as determined pursuant to Section 11 of this Compact), the Tribe will make semi-annual payments to the treasurer for the county described in paragraph (2)(a) of this subsection 18 (A) to be held by said treasurer for and on behalf of the Local Revenue Sharing Board described below, as follows:

(1) Payment in the aggregate amount equal to two percent (2%) of the net win at each casino derived from all Class III electronic games of chance, as those games are defined in this Compact. The county treasurer shall disburse the payments received as specified by lawful vote of the Local Revenue Sharing Board.

(2) It is the State's intent, in this and its other Compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the Class III gaming facility. To this end, a Local Revenue Sharing Board shall be created by

those local governments in the vicinity of the Class III gaming facility to receive and disburse the semi-annual payments from the Tribe as described below. Representatives of local governments in the vicinity of the Class III gaming facility shall be appointed by their respective elected bodies and shall serve at the pleasure of such elected bodies. The Local Revenue Sharing Board shall consist of representatives from each of the following jurisdictions:

(a) One (1) representative from the county in which the Class III gaming facility is located;

(b) One (1) representative from the village, city, or township in which the Class III gaming facility is located;

(c) One (1) representative from a third local unit of government determined by the representatives identified in sub-paragraphs (a) and (b), above, to be most impacted by the Class III gaming facility.

The procedures for the functioning of the Local Revenue Sharing Board, guidelines for establishment of criteria or a formula for the distribution of revenues, and all other matters not specified in this Compact, shall be determined by the Local Revenue Sharing Board. Decisions of the Local Revenue Sharing Board concerning the

distribution of revenue shall require the unanimous vote of the three (3) representatives. The Local Revenue Sharing Board's sole function shall be to determine and make allocations of the tribal payments for the purpose described and subject to the limitations in subsection (3) - (5) below.

(3) Of the payments made to local unit of government, not less than one-eighth of the aggregate payment described in subsection (1) shall be paid to local public safety organizations for public safety purposes.

(4) Out of the aggregate payments to local units of government, each local unit of government shall receive no less than an amount equivalent to its share of ad valorem property taxes that would otherwise be attributed to the Class III Gaming Facility if that site were subject to such taxation.

(5) Out of the aggregate payments to local units of government, after deducting the payment provided in subparagraphs (3) and (4), the Board shall allocate an additional portion of such payments to local units of government to offset the actual costs incurred by local units of government as a result of the development of a Class III gaming facility in the vicinity. The balance of such payments remaining after reimbursement of such actual costs may be utilized for any other lawful local government purposes.

(6) As used in this subsection, "net win" means the total amount wagered on each electronic game of chance, minus the total amount paid to players for winning wagers at such machines.

(7) For purposes of these payments, all calculations of amounts due shall be based upon a fiscal year beginning October 1 and ending September 30 of the

following calendar year, unless the parties agree on a different fiscal year, and all payments due the local units of government pursuant to the terms of this Section shall be paid no later than sixty (60) days after October 1 and March 31 of each years. Any payments due and owing from the Tribe in the year this Compact is approved, or the final year the Compact is in force, shall reflect the actual net win but only for the portion of the year the Compact is in effect.

IN WITNESS WHEREOF, the Tribal Chairperson acting for the Nottawaseppi Huron Band of Potawatomi and the Governor acting for the State of Michigan have hereunto set their hands and seals.

Date: 11-28-98

NOTTAWASEPPI HURON BAND
OF POTAWATOMI

By /s/ _____
Chairperson

Date: 12-3-98

STATE OF MICHIGAN

By /s/ _____
Governor

APPROVAL BY THE SECRETARY OF THE INTERIOR

The foregoing Compact between the Nottawaseppi Huron Band of Potawatomi Indians and the State of Michigan is hereby approval this _____ day of _____, 199___, pursuant to authority conferred on me by Section 11 of the Indian Gaming Regulatory Act, 102 Stat. 2472. I direct that it be promptly submitted to the Federal Register for publication.

/s/ _____
Kevin Gover
Assistant Secretary - Indian Affairs

APPENDIX B

STATE OF MICHIGAN
IN THE 30TH CIRCUIT COURT

Case No. 99-90165-CZ

[Dated June 9, 1999]

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,
Plaintiffs,

v.

the STATE OF MICHIGAN,
Defendant.

Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Daniel K. DeWitt (P51756)
Attorneys for Plaintiffs
Warner Norcross & Judd LLP
900 Old Kent Building
111 Lyon Street, NW
Grand Rapids, MI 49503-2489
(616) 752-2000

A civil action between these parties or other parties arising out of the transaction or occurrence alleged in the complaint has been previously filed in United States District Court for the Western District of Michigan, where it was given docket number 5:99-CV-14 and was assigned to Judge David W. McKeague. The action is no longer pending.

COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. This is an action for declaratory relief under MCR 2.605 to enforce the power of the people of the State of Michigan and their elected legislators to regulate gambling within the borders of the State as they see fit and in accordance with Constitutional requirement.

2. In the absence of the relief requested in this action, residents of four localities within the State may be subjected against their will to the presence of gambling casinos in their communities even though Michigan law generally prohibits such gambling in the State, MCLA § 750.301, and even though a majority-let alone a super-majority-of the duly elected legislators have not voted in both houses of the Michigan Legislature to authorize the gambling as required by the Constitution of the State of Michigan, and even though the residents of the affected localities have not been given the opportunity to vote on the matter, as required by the State Constitution.

3. In January 1997, purportedly on behalf of the State, the Governor negotiated and signed gambling compacts (the "Gambling Compacts") with four Indian tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of

Potawatomi Indians, the Little River Band of Ottawa Indians and the Huron Potawatomi. The Gambling Compacts are attached as Exhibit A. If the tribes are permitted to operate casinos under these Compacts as contemplated, they will add to the more than fourteen Indian casinos already operating in Michigan.

4. The Gambling Compacts purport to clear the way for casino-style gambling only in specified and restricted areas within the State and therefore the Compacts will have a disproportionate impact on certain local communities. On information and belief, the four tribes intend to build casinos in Battle Creek, Mackinac City, Mackinac, and New Buffalo.

5. The Gambling Compacts were allegedly made under the federal Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701 *et seq.* ("IGRA" or the "Act"). Under IGRA, casino-style gambling on Indian lands may operate only in conformance with a valid "Tribal-State compact" approved by the "State." 25 U.S.C.A. § 2710(d)(1)(C). State law determines how the State of Michigan may validly enter into and bind itself to Tribal-State compacts.

6. The Gambling Compacts at issue in this case have not been approved as required by the Constitution of the State of Michigan, which expressly requires that all legislation, including these Compacts, be approved by bill. The Michigan Attorney General has expressly so ruled in Attorney General Opinion No. 6960 (Oct. 21, 1997), a copy of which is attached as Exhibit B.

7. Instead of following the procedures specified by the Constitution and the Attorney General of the State for a valid approval of the Compacts by bill, the Legislature chose to test support for the Gambling Compacts by resolution. Unlike a

bill, which must be passed by a majority of elected and serving members, a resolution may be passed by less than a majority of legislators.

8. The Legislature chose to operate by resolution, rather than by bill, because the Compacts lacked the necessary support for approval by bill. Indeed, a majority of elected members has not voted in both houses to approve the Compacts. Instead, during the 1998 "lame duck" session of Michigan's Legislature, a plurality of the members of Michigan's House of Representatives passed a resolution purporting to approve the Gambling Compacts. The resolution, House Concurrent Resolution 115 ("HCR 115"), is attached as the first page of Exhibit A. After being defeated several times, HCR 115 passed the House by a vote of 48 to 47, substantially short of the 56 votes that are required to pass a bill in the House. The Senate eventually approved HCR 115 by a vote of 21 to 17.

9. The Gambling Compacts also violate other provisions of the Constitution of the State of Michigan, as more particularly described in the following allegations.

10. Accordingly, the Plaintiffs ask the court for a declaration that the Gambling Compacts violate Michigan's Constitution of 1963 and are consequently null and void.

PARTIES AND STANDING

11. Michigan'S Constitution is intended to benefit and protect the people of Michigan. Mich. Const. 1963, Art. I, § 1.

12. The issues set forth in this Complaint are of great public interest and importance.

13. Taxpayers of Michigan Against Casinos ("TOMAC" is a Michigan non-profit corporation that seeks to protect the citizenry of the State by opposing the proliferation of Indian casinos and other gambling venues in the State of Michigan. TOMAC has standing to bring this suit based on the standing of its individual members.

14. TOMAC is based in New Buffalo, Michigan, which is one of the localities that will be disproportionately affected if the Gambling Compacts are not invalidated.

15. One of TOMAC's members, Russell Bulin, resides in Union Pier, Berrien County, Michigan where he owns and operates Pine Garth Inn, a bed and breakfast. As a citizen, resident and business owner in Michigan, Mr. Bulin has standing to bring this action in that he has been denied the benefit and protection of Michigan's Constitution. The constitutional violations by the State have injured Mr. Bulin in a way that is different from the citizenry at large. Namely, the Gambling Compact with the Pokagon Band of Potawatomi Indians purports to clear the way for casino-style gambling in Berrien, Allegan, Van Buren and Cass Counties in Michigan. As a resident and business owner in Berrien County, Mr. Bulin believes he will be exposed to, and injured by, the negative effects of casino gambling, including: a) increased crime; b) the diversion of police and judicial resources away from other activities; c) decreased property values; d) the loss of the use of other businesses, such as retail stores and restaurants, forced out by the casino; e) the loss of consumer money to be spent at Mr. Bulin's business; f) increased bankruptcies in the community; g) the diversion of community resources to the treatment of gambling addicts; h) the weakening of the moral and family atmosphere in the community; i) the diversion of community resources to the construction and maintenance of infrastructure for the casino;

and j) the overall weakening of the area's economy. Furthermore, Mr. Bulin has been deprived of his right to vote to approve or disapprove the Gambling Compacts, as required by Article IV, Section 29, of Michigan's Constitution concerning local acts.

16. Another of TOMAC's members, Michael Hosinski, resides in Union Pier, Berrien County, Michigan. Mr. Hosinski owns and operates Union Pier Bench and Table, a custom furniture store also in Union Pier, Michigan. As a citizen, resident and business owner in Michigan, Mr. Hosinski has standing to bring this action in that he has been denied the benefit and protection of the Michigan Constitution. The constitutional violations by the State have injured Mr. Hosinski in a way that is different from the citizenry at large. Namely, the Gambling Compact with the Pokagon Band of Potawatomi Indians purports to clear the way for casino-style gambling in Berrien, Allegan, Van Buren and Cass Counties in Michigan. As a resident and business owner in Berrien County, Mr. Hosinski believes he will be exposed to, and injured by, the negative effects of casino gambling which include: a) increased crime; b) the diversion of police and judicial resources away from other activities; c) decreased property values; d) the loss of the use of other businesses, such as retail stores and restaurants, forced out by the casino; e) the loss of consumer money to be spent at Mr. Hosinski's business; f) increased bankruptcies in the community; g) the diversion of community resources to the treatment of gambling addicts; h) the weakening of the moral and family atmosphere in the community; I) the diversion of community resources to the construction and maintenance of infrastructure for the casino; and j) the overall weakening of the area's economy. Furthermore, Mr. Hosinski has been deprived of his right to vote to approve or disapprove the

Gambling Compacts, as required by Article IV, Section 29, of Michigan's Constitution concerning local acts.

17. Plaintiff Laura Baird was and is the State Representative in the Michigan House of Representatives for the 70th District. Ms. Baird voted against the Gambling Compacts, and was a member of the majority of elected State Representatives that did not vote to approve the Gambling Compacts.

18. As a legislator and member of the majority of elected State Representatives that did not vote to approve the Compacts, Plaintiff Laura Baird has standing to bring this action because her position would have carried the day but for the unconstitutional procedures used to purportedly approve the Compacts. Specifically, HCR 115 cleared the House by a vote of 48 to 47-substantially short of the 56 vote majority that is required to pass a bill in the House.

19. By using resolution, rather than the constitutionally mandated bill, Ms. Baird was also deprived of her constitutional rights as a member of the House to: a) consider, debate or vote to approve or disapprove the Gambling Compacts in accordance with the constitutional requirements for bills; b) consider, debate or vote to approve or disapprove the Gambling Compacts in accordance with the constitutional requirements for local acts; c) consider, debate, draft or vote to approve or disapprove any amendment to the Gambling Compacts; d) participate in the negotiation and drafting of the Gambling Compacts; and e) invoke the provisions of the Michigan Constitution to protect and serve the electorate.

20. The Plaintiffs' injuries and grievances were caused by the State's activities that form the basis of this Complaint and may be redressed by the court's declaration that the

Gambling Compacts are null and void unless and until approved in accordance with Constitutional requirements.

21. The Defendant State of Michigan is a sovereign state of the United States of America. The State's seat of government is in Lansing, Michigan. Mich. Const. 1963 Art. III, § 1.

JURISDICTION AND VENUE

The court has jurisdiction over this action pursuant to MCLA § 600.605 and MCR 2.605(2).

23. As set forth in this complaint, there exists an actual controversy between the parties to this action in that the Gambling Compacts have been negotiated and signed by the Governor and purportedly approved only by resolution, and not by bill, of the State Legislature. Indeed, a majority of the duly elected members of the Michigan Legislature in both houses have not voted to approve the Gambling Compacts in any form. The Gambling Compacts were also not approved in accordance with the constitutional procedures applicable to local acts. Finally, the Compacts, as written, violate the separation of powers doctrine, by giving the Governor of the State the purported power to amend the Gambling Compacts in whatever way he sees fit without the approval of the Legislature in any form, and even over the objection of the Legislature. In sum, the parties to this action disagree regarding the constitutionality of the Defendant's actions.

24. Interpreting the State's Constitution and deciding whether an action exceeds constitutional authority is the function and responsibility of the courts.

25. In accordance with MCLA §§ 600.1615, venue in the 30th Circuit Court in Ingham County is proper.

GENERAL ALLEGATIONS

A. The Gambling Compacts Purport to Set Legislative Policy.

26. Gambling is generally illegal in Michigan and is against the public policy of the State. MCLA § 750.301 *et. seq.* The Gambling Compacts purport to override this general prohibition and public policy, and establish a separate legislative scheme for a series of new Indian casinos.

27. The Gambling Compacts purport to authorize the four Indian tribes to conduct casino-style gambling on their lands. Gambling Compacts.§ 3. Such gambling includes craps, roulette, keno and electronic games of chance. Gambling Compacts, § 3.

28. The four Indian tribes can operate casino-style gambling only while the Gambling Compacts or any renegotiated compacts are in effect. Gambling Compacts, § 12(D).

29. The Gambling Compacts prohibit the application of any state gambling law to the gambling conducted in casinos operated by the four Indian tribes. Gambling Compacts, § 3(A).

30. The Gambling a Compacts regulate the conduct of casino-style gambling on the four Indian tribes' eligible Indian lands. Gambling Compacts, § 4. Such regulations include provision for licensing certain employees, record keeping and accounting practices, and reimbursement by the four Indian

tribes of the State's expenses. Gambling Compacts. § 4(D), 4(H) and 4(M)(5).

31. The Gambling Compacts purport to pick and choose which State laws apply to the tribes' casino operations. For example, the Gambling Compacts make Michigan's worker compensation and employee security laws and regulations applicable to casino employees. Gambling Compacts, § 5. But the Gambling Compacts except the casinos from Michigan's building codes and health and safety laws. The gambling Compacts also fail to make the extensive gaming regulations and safeguards applicable to casino gambling in Detroit applicable to the future Indian casinos. *See e.g.*, the Michigan Gaming Control and Revenue Act, MCLA § 432.201 *et seq.*, and accompanying regulations, 1998 AACS Rule 432.1101 *et seq.*

32. The Gambling Compacts grant to the Indian tribes the exclusive right, subject to certain exceptions, to operate electronic games of chance and commercial casino games. Gambling Compacts, § 17(B). In return for this exclusive right, the four Indian tribes are required to pay to the Michigan Strategic Fund 8% of the net win derived from electronic games of chance. Gambling Compacts, § 17(C). In comparison, the casinos authorized for the City of Detroit will pay to the State over 21% of the net win from all forms of gambling.

33. These and other provisions of the Gambling Compacts make them functional equivalents of legislation, thus requiring approval of the Michigan Legislature by bill under Article IV, Section 22 of the Constitution of the State of Michigan.

B. The Gambling Compacts Circumvent the Constitutional Requirements for Legislation.

34. The Michigan Constitution imposes several important procedural requirements on the enactment of legislation in the State. The procedures help ensure that the will of the people of the State is reflected in the outcome of the legislative process.

35. One key procedural requirement for legislation is that it be enacted by bill, not resolution. A bill requires a majority vote of the members elected and serving in both houses of the Legislature. A resolution, in contrast, requires only a majority vote of the members present at the time of the vote. Thus, a resolution can "pass" the Legislature even if a majority of the people's elected representatives do not vote in favor of it in both houses. That is precisely what happened in this case.

36. During the 1998 "lame duck" session of Michigan's Legislator, a plurality of Michigan's Legislators passed HCR 115 purporting to approve the Gambling Compacts. Support for the Gambling Compacts was tested by resolution, instead of by bill, because the Gambling Compacts lacked the support needed for approval by bill.

37. After being defeated several times, HCR 115 cleared the House on December 10, 1998, by a vote of 48 to 47, substantially short of the 56 vote majority required to pass a bill in the House. The Senate initially approved HCR 115 by only one vote, 19 to 18. Due to the close vote, the measure was reconsidered, passing by a vote of 21 to 17 at 1:42 a.m. on December 11, 1998, the last day of the 89th Legislature before official adjournment on December 22. Based on these votes, the Gambling Compacts were deemed "approved" by

the Legislature even though a majority of the people's elected representatives in the House did not vote to support the Compacts.

38. A bill is also subject to numerous additional procedural requirements, including a specified number of readings in each house, procedures for public hearings on the bill, public inspection of the voting records of any committee and the full Legislature, notice periods prior to consideration, the possibility of amendments, and rules relating to final consideration and possible veto of the bill by the Governor. Furthermore, resolutions are immediately effective. For a bill to become immediately effective, a two-thirds majority vote of the members of both houses is required. None of these procedures was followed in the case of the Gambling Compacts.

39. In Attorney General Opinion 6960 (Oct. 21, 1997), issued at the request of two members of the Legislature, the Attorney General concluded that legislative approval of Tribal-State compacts was necessary and that Michigan's Constitution required that the approval be *by bill*, not by resolution. Exhibit B. Contrary to the Opinion, the Attorney General, the procedures for approval by bill were not followed in this case.

C. The Gambling Compacts Circumvent the Constitutional Requirements for Local Acts.

40. The Gambling Compacts purportedly clear the way for casino gambling on the four Indian tribes' "eligible Indian lands." Gambling Compacts, § 3.

41. The Gambling Compact with the Pokagon Band of Potawatomi Indians defines "eligible Indian lands" as

reservation lands acquired within Allegan, Barrien, Van Buren, and Cass counties, in Michigan. The Gambling Compact with the Little Traverse Bay Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Emmet and Charievoix counties, in Michigan. The Gambling Compact with the Little River Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Manistee and Mason counties, in Michigan. The Gambling Compact with the Huron Potawatomi Indians defines "eligible Indian lands" as reservation lands acquired within Calhoun County, Michigan.

42. In addition, the Gambling Compacts make it practically impossible for any of the four Indian tribes to establish additional casinos outside of "eligible Indian lands" by requiring that any such casino share revenues with all of the other recognized tribes in the State. Gambling Compacts, § 9. Locality is further restricted by a complete prohibition of any casino within 150 miles of Detroit. Gambling Compacts, § 16.

43. Thus, the Gambling Compacts operate over particular localities, and not over the whole territory of the State, and therefore are "local acts." Yet, they were not approved by a two-thirds vote of the State House and Senate and by a majority vote of the electorate affected, as required by Michigan's Constitution. Mich. Const. 1963, Art. IV, § 29.

D. The Gambling Compacts Violate the Constitutionally Mandated Separation of Powers.

44. The Gambling Compacts purport to be binding on the "State" for 20 years unless modified or terminated by written agreement of both parties. Gambling Compacts, § 12(A). The Indian tribes can invoke IGRA to request the State to negotiate successor compacts to the Gambling Compacts. Gambling Compacts, §.12(C).

45. According to their terms, the Gambling Compacts may be amended by mutual agreement between the appropriate Indian tribe and "the State." Gambling Compacts, § 16. Any amendment must be initiated and negotiated by the Indian tribe and the Governor, "who shall act for the State," and must be approved by the United States Secretary of the Interior. Gambling Compacts, § 16(A), (B) and (C). "Upon the effective date of the amendment," a copy of the amendment is transmitted to the Michigan Legislature. Gaming Compacts § 16(D). No approval of any amendment is required from the Legislature.

46. Accordingly, under the literal terms of the Gambling Compacts, the Governor and the tribes may now reach any agreement they choose even if the Legislature disapproves. This is a blatant and improper delegation of legislative power to the executive, and a violation of separation of powers principles enshrined in the Michigan Constitution.

COUNT I

The Gambling Compacts Violate Article IV, Section 22 (Bills) of Michigan's Constitution

47. Plaintiffs incorporate all preceding allegations.

48. State law determines how the State of Michigan may validly enter into and bind itself to Tribal-State compacts.

49. Article IV, Section 22, of Michigan's Constitution provides that "All legislation shall be by bill and may originate in either house." Mich. Const. 1963, Art. IV, § 22. In addition, to ensure that the Legislature properly considers all legislation, Michigan's Constitution imposes several procedural safeguards, including that all bills be distributed to each member of the Legislature at least five days before passage and be read in each house of the Legislature at least three times. Mich. Const. 1963, Art. IV, § 26.

50. Article IV, Section 26, of Michigan's Constitution requires that all bills be passed by a majority of the members elected and serving in the House and Senate. Mich. Const. 1963, Art. IV, §26.

51. The Gambling Compacts are legislation, evidenced by the fact that they, among other things: legalize gambling activities that otherwise violate Michigan law, establish requirements to be met in the management and operation of the casinos, extend application of selected Michigan laws and regulations to cover the casinos, prohibit the application of other laws, and commit the four Indian tribes to making payments to the State. In addition, the Gambling Compacts

are legislation because they purport to be binding outside of the Legislature.

52. House Concurrent Resolution 115 approving the Gambling Compacts cleared the House on December 10, 1998, by a vote of 48 to 47. This is short of the 56 votes required to pass a bill in the House. The Senate eventually approved the resolution by a vote of 21 to 17 on the last day of the "lame duck" session. The Gambling Compacts have never been approved by a majority of the duly elected members of both houses of the Michigan Legislature.

53. The Gambling Compacts are legislation that must be considered and enacted by bill. The State has violated Article IV, Section 22, of Michigan's Constitution by failing to follow the mandated procedure. The Attorney General Opinion No. 6960 (Oct. 21, 1997), attached as Exhibit B.

WHEREFORE, the Plaintiffs respectfully ask the court for a declaration that the State has violated Article IV, Section 22, of Michigan's Constitution and that Gambling Compacts are void until approved by bill.

COUNT II

The Gambling Compacts Violate Article IV, Section 29 (Local or Special Acts) of Michigan's Constitution

54. Plaintiffs incorporate all preceding allegations.

55. Article IV, Seaion 29, of Michigan's Constitution provides:

> The Legislature shall pass no local or special act in any case where a general act can be made applicable,

> and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected.

Mich. Const. 1963, Art. IV § 29.

56. The Gambling Compacts purportedly clear the way for casino gambling on the four Indian tribes' "eligible Indian lands." Gambling Compacts, § 3.

57. The Gaming Compact with the Pokagon Band of Potawatomi Indians defines "eligible Indian lands" as reservation lands acquired within Allegan, Berrien, Van Buren, and Cass counties, in Michigan. On information and belief, the Band intends to build a casino in the vicinity of the City of New Buffalo, Michigan, even though the City of New Buffalo actively opposes casino gambling and recently passed an ordinance declaring gambling casinos a nuisance.

58. The Gambling Compact with the Little Traverse Bay Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Emmet and Charlevoix counties, in Michigan. On information and belief, the Band intends to build a casino in Mackinac City, Michigan.

59. The Gambling Compact with the Little River Band of Ottawa Indians defines "eligible Indian lands" as reservation lands acquired within Manistee and Mason counties, in Michigan. On information and belief, the Band has initiated construction of a casino in the City of Manistee, Michigan.

60. The Gambling Compact with the Huron Potawatomi Indians defines "eligible Indian lands" as reservation lands acquired within Calhoun County, Michigan. On information and belief, the Band intends to build a casino in Battle Creek, Michigan.

61. The Gambling Compacts operate within particular localities, and not over the whole territory of the State. Accordingly, the Gambling Compacts are local and special acts under Article IV, Section 29. Michigan's Constitution, and must be approved by two-thirds of the Legislators in each house and by a majority of the electors found in the affected counties.

62. The Legislature has failed to treat the Gambling Compacts as local or special acts. In particular, a two-thirds majority of the legislators in both houses has not voted to approve the Compacts and the Compacts have not been submitted to a vote of the electors of the affected localities. On information and belief, the State knows that the electors would not approve the Gambling Compacts. Indeed, the City of New Buffalo just passed an ordinance declaring casinos a nuisance.

WHEREFORE, the Plaintiffs respectfully ask the court for a declaration that the State has violated Article IV, Section 29, of Michigan's Constitution and that the Gambling Compacts are consequently null and void until approved by bill including the appropriate voting requirements for local acts.

COUNT III

The Gambling Compacts Violate Article III, Section 2 (Separation of Powers) of Michigan's Constitution

63. Plaintiffs incorporate all preceding allegations.

64. Article III, Section 2, of Michigan's Constitution provides that:

> The Powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Mich. Const., Art III, § 2.

65. The Legislature is vested with the power to write the laws, determine their applicability, and in so doing, determine the public policy of the State.

66. It is the Governor's duty and within his power to execute the laws.

67. According to their terms, the Gambling Compacts may be amended by the Governor without approval of the Legislature. Gambling Compacts,§ 16. Therefore, the Governor can rewrite the Gambling Compacts and effectively enact new legislation without the involvement of the Legislature, and even if the Legislature disapproves.

68. Furthermore, the Governor effectively usurped the Legislature's right to write the laws by submitting the Gambling Compacts to the Legislature without providing an

opportunity for the Legislature to amend or modify the Compacts.

69. Thus, the State has improperly delegated the legislative power to the executive in violation of the separation of powers doctrine set forth in Article III, Section 2, of Michigan's Constitution.

WHEREFORE, The Plaintiffs respectfully ask the court for a declaration that the State has violated Article III, Section 2, of Michigan's Constitution and that the Gambling Compacts are consequently null and void as currently written.

Dated: June 9, 1999

WARNER NORCROSS & JUDD LLP

By _____

Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Daniel K. DeWitt (P51756)

900 Old Kent Building
111 Lyon Street, NW
Grand Rapids, MI 49503-2489
Telephone: (616) 752-2000

Attorneys for Plaintiffs

APPENDIX C

IN THE SUPREME COURT OF MICHIGAN

Appeal from the Michigan Court of Appeals
(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

Supreme Court No. 122830
Court of Appeals No. 225017
Ingham County Cir. Ct. No. 99-90195-CZ

[Filed November 20, 2003]

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,
Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,
Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV and GAMING ENTERTAINMENT, LLC,
Intervening Defendants-Appellees.

BRIEF ON APPEAL - APPELLANT

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE , CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

Submitted by:

Robert J. Jonker (P38552)
William C. Fulkerson (P13758)
Norbert F. Kugele (P47084)
Daniel K. DeWitt (P51756)

Warner Norcross & Judd LLP
111 Lyon Street, N.W., Suite 900
Grand Rapids MI 49503-2487
(616) 752-2000

Attorneys for Appellants

TABLE OF CONTENTS

Page

STATEMENT OF JURISDICTION xiv

QUESTIONS PRESENTED FOR REVIEW xv

INTRODUCTION 1

STATEMENT OF FACTS 3

I. The legislature "approved" four gambling compacts by mere resolution after failing to marshal the support necessary for legislative enactment 3

II. The Compacts' terms reflect policy judgments . 5

III. Procedural History 7

STANDARD OF REVIEW 8

ARGUMENT 8

I. IGRA expressly gives states a vehicle to apply judgments regarding public policy to Indian gambling 8

II. Compacts are both legislative and contractual in nature, and must be authorized by legislative enactment 10

III. House Concurrent Resolution 115 is unconstitutional because approving the compacts is a legislative act requiring action by bill 12

A. Michigan law prohibits the use of a concurrent resolution to sidestep the legislative process . . . 12

B. "Legislation" is any role that is binding on those outside the legislature, implements public policy, and supplants other forms of legislative action . . 17

C. The compacts are "legislation." 18

1. The compacts make policy decisions 19

a. Gambling involves important decisions of public policy 19
b. The compacts create an extensive regulatory scheme 21
c. The compacts determine the number of casinos 22
d. The compacts set State policy governing the balance of legal jurisdiction between the State and tribes 23
e. The compacts make policy decisions by raising and spending State revenue 25
f. Conclusion: the policy decisions in the compacts are legislative in nature 26

2. The compacts create new rules and impose additional duties on those outside the legislature . 27

3. HCR 115 supplants other appropriate modes of legislative action 30

IV. Other State Supreme Courts that have examined compacts agree that compacts are legislative in nature 31

V. The Court of Appeals' interpretation of IGRA is clearly erroneous and must be reversed 33

A. IGRA does not preempt state law, but instead provides a mechanism for the states to regulate gambling on Indian lands 34

B. The Court of Appeals erred in deciding that Federal law rather than State law determines the manner in which IGRA compacts are approved . 37

1. State constitutional law determines how states enter into compacts 37
2. IGRA does not determine how a compact is approved 38
3. The federal Compact Clause is also inapplicable 38

C. The Court of Appeals erred in concluding that the legislature routinely approves compacts by resolution 40

VI. The compacts violate Article III, Section 2 (separation of powers) of Michigan's constitution because they purport to empower the Governor to make policy judgments without legislative approval 42

VII. The compacts are local acts under Article IV, Section 29 (local or special acts) of Michigan's constitution because they expressly operate with particular impact on four specifically identified communities within the State 45

A. The compacts are local acts 45

B. The compacts do not comply with the constitutional requirements for local acts 46

CONCLUSION 49

INDEX OF AUTHORITIES

Page

Michigan Decisions

American States Ins Co v Detroit Auto Inter-Ins Exch,
117 Mich App 361, 323 NW2d 705 (1982) 17

Becker v Detroit Savings Bank, 269 Mich 432;
257 NW 853 (1934) 13, 15

Blank v Department of Corrections, 222 Mich App 385;
564 NW2d 130 (1997) 15

Blank v Department of Corrections, 462 Mich 103;
611 NW2d 530 (2000)
.1, 3, 16, 17, 18, 26, 27, 29, 30, 31, 33, 39, 40, 42, 50

City of Dearborn v Board of Supervisors,
275 Mich 151; 266 NW 304 (1936) 45

Civil Service Comm'n of Michigan v Auditor General,
302 Mich 673; 5 NW2d 536 (1942) 25, 26

Common Council of the City of Detroit v Engel,
202 Mich 536; 168 N-W 462 (1918) 46

Goldberg v Trustee of Elmwood Cemetery,
281 Mich 647; 275 NW 663 (1937) 23

House Speaker v Governor, 443 Mich 560;
506 NW2d 190 (1993) 48

Huron-Clinton Metro Authority v Board of Supervisors,
300 Mich 1; 1 NW2d 430 (1942) 46

In re Manufacturer's Freight Forwarding Co,
294 Mich 57; 292 HW 678 (1940) 17

Judicial Attorneys Ass'n v Michigan, 459 Mich 291;
586 NW2d 894 (1998) 43

McCartney v Attorney General, 231 Mich App 722;
587 NW2d 824 (1998) 40, 41, 42

Michigan Gaming Inst, Inc v State Bd of Educ,
211 Mich App 514;
536 NW2d 289 (1995) 17, 19, 20, 26

Michigan Gaming Inst, Inc v State Bd of Educ,
451 Mich 899; 547 NW2d 882 (1996) 17, 20

Michigan v Wayne Co Clerk, 466 Mich 640;
648 NW2d 202 (2002) 45

Musselman v Governor, 200 Mich App 656;
505 NW2d 288 (1993) 42

People v Gahan, 456 Mich 264;
571 NW2d 503 (1997) 16

People v Stevens, 461 Mich 655;
610 NW2d 881 (2000) 16

Spiek v Michigan Dep't of Transportation, 456 Mich 331;
572 NW2d 201 (1998) 8

Straus v Barbee, 262 Mich 113;
247 NW 125 (1933) 23

Sutherland v Governor, 29 Mich 320, 324 (1874) 42

Tiger Stadium Fan Club v Governor, 217 Mich App 439;
553 NW2d 7 (1996) 25, 26, 40, 41

Young v Ann Arbor, 267 Mich 241; 255 NW 579 (1934) 8

Federal Decisions

Adams Fruit Co v Barrett, 494 US 638;
110 S Ct 1384; 108 L Ed 2d 585 (1990) 36

Baird v Babbitt, No 5:99-CV-14, slip op at 2
(WD Mich, 1999) 4, 5, 7, 30

California v Cabazon Band of Mission Indians, 480 US 202;
107 S Ct 1083; 94 L Ed 2d 244 (1987) 8, 9, 34

Cheyenne River Sioux Tribe v South Dakota,
3 F3d 273 (CA 8, 1993) 35

Curler v Adams, 449 US 433; 101 S Ct 703;
66 LEd 2d 641 (1981) 39

Gaming Corp of America v Dorsey & Whitney,
88 F3d 536 (CA 8, 1996) 34

Immigration and Naturalization Service v Chadha,
462 US 919; 103 S Ct 2764;
77 L Ed 2d 317 (1982) 14, 15, 16, 17, 18, 30, 40

Iowa Mutuallns Co v LaPlante, 480 US 9; 107 S Ct 971;
94 L Ed 2d 10 (1987) 27

Keweenaw Bay Indian Community v United States,
136 F3d 469 (CA 6, 1998) 8

Prentis v Atlantic CoastLine Co, 211 US 210; 29 S Ct 67; 53 L Ed 150 (1908) 18

Pueblo of Santa Ana v Kelly, 104 F3d 1546 (CA 10, 1997) 9, 10, 37, 38, 39

Rodriguez v United States, 480 US 522; 107 S Ct 1391; 94 L Ed 2d 533 (1987) 19

Seminole Tribe of Florida v Florida, 517 US 44; 116 S Ct 1114; 134 L Ed 2d 252 (1996) 35, 36

South Carolina State Ports Authority v Federal Maritime Comm'n, 535 US 743; 122 S Ct 1864; 152 L Ed 2d 962 (2002) 36

United States Steel Corp v Multistate Tax Comm'n, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978) 38, 39

United States v Cook, 922 F2d 1026 (CA 2, 1991) . 19, 34

United States v Santee Sioux Tribe of Nebraska, 135 F3d 558 (8 CA, 1998) 10, 35

United States v Washington, 879 F2d 1400 (CA 6, 1989) 20

Willis v Fordice, 850 F Supp 523 (SD Miss, 1994) 31

Yakus v United States, 321 US 414, 64 S Ct 660; 88 L Ed 834 (1944) 17

Other States' Decisions

Alaska v ALIVE Voluntary, 606 P2d 769 (Alas, 1980) . . 14

Aveline v Pennsylvania Board of Probation and Parole,
729 A2d 1254 (Pa, 1999) 10, 11

Confederated Tribes of the Chehalis Reservation v Johnson,
135 Wash 2d 734; 958 P2d 260 (1998) 32

Gallegos v Pueblo of Tesuque, 132 NM 207;
46 P3d 668 (2002) 32

Hotel Employees & Restaurant Employees Int'l Union
v Davis, 21 Cal 4th 585; 981 P2d 990 (1999) . . 34, 37

Kansas v Finney, 251 Karl 559;
836 P2d 1169 (1992) 10, 32, 33

Mullan v California, 114 Cal 578; 46 P 670 (1896) . . 1-5

National Transportation, Inc v Howlett, 37 Ill App. 3d 249;
345 NE2d 767 (1976) 11

New Mexico v Johnson, 120 NM 562;
904 P2d 11 (1995) 24, 25, 32, 33, 38

Saratoga County Chamber of Commerce, Inc v Pataki,
712 NYS2d 687; 275 AD2d 145
(NY App Div, 2000) 37, 38

Saratoga County Chamber of Commerce Inc v Pataki,
2003 NY Lexis 1470;
NE2d (NY, 2003) 32, 33, 38, 41

Saratoga County Chamber of Commerce Inc v Pataki;
740 NYS2d 733; 293 AD2d 20
(NY App Div, 2002) 9

State v Svenson, 104 Wash 2d 533; 707 P2d 120 (1985) 10

Sullivan v Pennsylvania, 550 Pa 639;
708 A2d 481 (1998) 11

Administrative Rulings

OAG, 1979-1980, No 5,711 (May 22, 1980) 45
OAG, 1997, No 6,960 (October 21, 1997) 4, 19, 29, 30, 33

Michigan Law

Const 1963, art 3, § 2 . . . . . xiii, 42
Const 1963, art 4, § 1 . . . . . 4, 42
Const 1963, art 4, § 14 5
Const 1963, art 4, § 22 . . . . . xiii, 4, 12, 13, 31
Const 1963, art 4, § 23 . . . . . 13, 31
Const 1963, art 4, § 26 . . . . . 4, 5, 13, 31
Const 1963, art 4, § 29 . . . . . xiii, xv, 45, 46
Const 1963, art 4, § 33 . . . . . 13, 31
Const 1963, art 5, § 8 42
Const 1963, art 5, § 17 42
Const 1963, art 7, § 2 29
Const 1963, art 7, § 7 29
Const 1963, art 7, § 14 29
MCL 2.201 12
MCL 205.581 . . . . . 12, 39
MCL 286.501 12
MCL 295.107 12
MCL 3.163 12
MCL 3.701 12

MCL 3.711 12
MCL 3.751 12
MCL 3.981 12
MCL 30.261 12
MCL30.404 12
MCL 32.559 12
MCL 324.32201 12
MCL 324.62101 12
MCL 330.1920 12
MCL 388.1301 12
MCL 388.1371 12
MCL 390.1531 12
MCL 432.101 et seq 20
MCL 432.201 et seq 20, 21
MCL 432.208 22
MCL 432.209(9) 22, 27
MCL 432.209(14) 22
MCL 462.71 12
MCL 462.81 12
MCL 550.11 12
MCL 600.3801 20
MCL 750.301 20
MCL 750.302 20
MCL 750.303 20
MCL 750.309 20
MCL 780.601 12
MCL 798.101 12
MCL 798.103 12

Federal Law

US Const, art I, § 10, cl 3 39
18 USC 1166 . . . . . 9, 19, 23, 25, 34, 35
25 USC 465 47
25 USC 2703(8) 6

25 USC 2701(3) 9
25 USC 2706(b)(10) 36
25 USC 2709 36
25 USC 2710(d) 10, 38
25 USC 2710(d)(1) 10
25 USC 2710(d)(1)(A) 38
25 USC 2710(d)(1)(c) 6, 38, 42
25 USC 2710(d)(a)(A) 35
25 USC 2710(d)(3)(c) 23, 35
25 USC 2710(d)(7) 35
25 USC 2719 47
64 FR 17535 (April 12, 1999) 36
Immigration and Nationality Act, 8 USC 1254 17
Indian Gaming Regulatory Act, 18 USC 1166-1168,
25 USC 2701-2721 5

Other State's Law

Ariz Rev Star 5-601 31
Cal Gov't Code 12012.5(a), (b) 31
Cal Gov't Code 12012.5(d) 31
Colo Rev Stat 12-47.1 31
Colo Rev Stat 12-47.2-101 31
Idaho Code 67-429A 31
Iowa Code 10A.104(10) 31
Kan Stat Ann 46-2303 31
La Rev Stat Ann 46:2303 . . . . . 31, 49
Minn Stat 3.9221 31
Miss Code Ann 7-1-13 31
Mont Code Ann 18-11-103 32
Mont Code Ann 90-1-105 32
ND Cent Code 54-58-03 31
Neb Rev Stat 9-1,106 31
NM Stat Ann 11-13-1 . . . . . 25, 31, 32
Ohio Rev Code Ann 107.25 31

Okla Stat Ann, tit 74, 1221 31
SD Codified Laws 1-4-25 31
SD Codified Laws 42-7B-11 31
Wash Rev Code 9.46.360 . . . . . 31, 32, 49
Wash Rev Code 43.06.010 31
Wis Stat 14.035 . . . . . 31, 49

Michigan Court Rules

MCR 2.116(C)(8) 8
MCR 2.116(C)(10) 8
MCR 7.301(A)(2) xiii

Other Authorities

1 Cooley, Constitutional Limitations (8th ed) 13
37 Gongwer News Service, Michigan Report No 237 (December 10, 1998) 5
Hasday, *Interstate Compacts in a Democratic Society: the Problem of Permanency,* 49 Fla L Rev 1 (Jan, 1997) 11
1998 Journal of the House (No. 83, December 10, 1998) 5
Michigan Legislative Service Bureau, *Interstate Compacts* 11
Select Committee on Indian Affairs Report, S Rep No 100-446 10
Senate Rule 3.107 5
State of Michigan Constitutional Convention of 1961, Official Record (Austin C. Knapp ed.) 13, 14
Zimmerman & Wendell, *The Law and Use of Interstate Compacts* (Council of State Governments, 1976) 11

STATEMENT OF JURISDICTION

Taxpayers of Michigan Against Casinos and Laura Baird (collectively, "TOMAC") appeal under Michigan Court Rule 7.301(A)(2) the decision and order of the Court of Appeals dated November 12, 2002, Ct of Appeals Op (App at 122a), reversing the decision of the Ingham County Circuit Court dated January 18, 2000, Cir County Ct Op (App at 106a).

TOMAC asks this Court to reverse the decision of the Court of Appeals and reinstate the judgment of the circuit Court. holding that the Michigan legislature violated Article IV, Section 22, of the Michigan constitution by legislating through concurrent resolution rather than by bill, and violated Article HI, Section 2, of the Michigan constitution by abdicating to the Governor unrestricted authority to amend the terms of the legislative act without legislative approval. TOMAC further asks this Court to reverse the decision of the Court of Appeals and hold that the Michigan legislature violated the "Local Acts" provision of the Michigan constitution, Article IV, Section 29, by "approving" legislation limited to certain counties within the State without following the constitutionally prescribed procedures for local acts.

QUESTIONS PRESENTED FOR REVIEW

1. Are the Michigan legislature's policy determinations in deciding whether and how to allow Indian tribes to operate casinos in Michigan legislative in nature, subject to the enactment and presentment requirements of the Michigan constitution?

The Court of Appeals answered: No
The trial court answered: Yes

TOMAC answers: Yes
State and Interveners answer: No

2. Has Congress, by enacting the Indian Gaming Regulatory Act ("IGRA"), preempted the State of Michigan's right to make policy decisions affecting gambling on Indian lands through compacts and the State of Michigan's constitutional requirements for enactment of legislation?

The Court of Appeals answered: Yes
The trial court answered: No
TOMAC answers: No
State and Interveners answer: Yes

3. Is it a violation of the Michigan constitution's separation of powers for the legislature to abdicate to the Governor the power to make new policy decisions in the compacts with Indian Tribes?

The Court of Appeals answered: This issue is not ripe for appellate review
The trial court answered: Yes
TOMAC answers: Yes
State and Interveners answer: No
Amici Curiae answer: Yes

4. Must a legislative act of local application that purports to limit casino gambling to four particular Michigan communities comply with Article 4, Section 29, of Michigan's constitution, which specifies the procedure for passing "local acts"?

The Court of Appeals answered: No
The trial court answered: No
TOMAC answers: Yes
State and Interveners answer: No

INTRODUCTION

Before December 11, 1998, a Michigan resident who tried to play slot machines on Indian lands in Calhoun county would have been committing a crime. On December 10 and 11, 1998, the Michigan legislature legalized such activity by "approving" a set of compacts with four Indian tribes. This change in the legal status of gambling was not the result of legislation passed by a majority of the elected and serving legislators, but rather the result of a concurrent resolution "approved" by *less* than a majority of all representatives.

Michigan's constitution requires that all legislation be by bill passed by a majority of members elected and serving in each house. This Court, in *Blank v Department of Corrections,* 462 Mich 103; 611 NW2d 530 (2000), articulated the test for determining whether action taken by the State is "legislative" in nature and thus subject to the constitutional requirements of formal enactment. Under this test, an activity is "legislative" if it (1) has the power to alter the rights, duties, and relations of parties outside the legislative branch, (2) involves policy determinations, and (3) supplants other legislative methods for reaching the same result. *Id.* at 114-115. Under this test, the compacts'

"approval" is legislative action that must be effected by bill, not resolution.

The compacts at issue legalized casino-style gambling for four different Indian tribes. The compacts reflect multiple public policy decisions, such as the minimum age of those allowed to gamble and work at the casinos, the conditions under which the State and local governments earl receive revenues from the casinos, the number of casinos permitted to operate in the State, and the jurisdiction given and denied the State over gambling activities. These choices impact not only the legislature, but also the tribes that are subject to the compacts, the State as a whole and how it deals with the Indian tribes, the Michigan residents who may gamble or work at the casinos, and the local communities in which the casinos will operate. Because a majority of the house of representatives could not agree that the compacts struck the proper balance on these important policy issues, the proponents of the compacts made an end run around the required legislative process, "approving" the compacts with less than a majority of the elected and serving representatives.

The compacts also impermissibly allow the Governor of Michigan to amend the compacts without additional legislative approval of any kind. Governor Granhohn recently exercised this power by amending the compact with the Odawa Indians to grant the tribe an additional casino in exchange for additional revenue payments to the State. This is a policy decision that the legislature must make. The legislature may not abdicate its responsibility to the Governor, and the Governor may not arrogate the power to herself. Because the compacts give the Governor unrestricted power to change State policy, the compacts violate the separation of :powers clause of the constitution.

Finally, the compacts also violate the local acts provision of the Michigan constitution. The compacts restrict casino operations to four distinct communities in the State and ensure that a casino will never operate anywhere near the City Of Detroit. As such, the compacts arc local acts that must comply with the local act requirements set forth in the constitution. These requirements include passage by two-thirds of the legislature and approval by the voters in the affected communities. Neither of these requirements have been met.

This Court must instruct the legislature that the constitutional requirements for legislation apply to compacts. Indian gambling is already big business in tint State, and Indian tribes in Michigan continue to press the legislature and the Governor for compacts or compact amendments that will allow even more casinos in Michigan. Voting margins in the legislature are thin and local support for casinos is limited. Accordingly, casino proponents will continue their efforts to skirt the constitutional requirements for legislative enactments. This Court attempted to settle the important question of what constitutes "legislation" just three years ago in *Blank,* but the Court of Appeals has now unsettled it--without even mentioning this Court's decision in *Blank.* As it did in *Blank,* this Court must articulate and enforce the constitutional requirements that the legislature make public policy in this State by bill, and in accordance with all the constitutional requirements for legislation. Accordingly, TOMAC respectfully asks this Court to hold House Concurrent Resolution 115 unconstitutional, and direct that any gambling compacts be approved, if at all, by legislative enactment, and not by resolution.

STATEMENT OF FACTS

I. The legislature "approved" four gambling compacts by mere resolution after failing to marshal the support necessary for legislative enactment

In January 1997, Michigan's Governor negotiated and signed four compacts with four Indian Tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Huron Potawatomi. The purpose of these compacts was to authorize four new Indian casinos in the State of Michigan. These four compacts are the predecessors to the compacts now at issue. By their terms, in order to become effective, the 1997 compacts required "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature." These compacts failed to garner legislative approval in any form.

Prompted by the Governor's negotiation of the four compacts, State Senator John D. Cherry, Jr. and State Representative Kirk A. Profit requested the formal opinion of the Michigan Attorney General on two issues:

> 1) is legislative approval necessary for the State to bind itself to the four compacts, and
>
> 2) does such approval require a statutory enactment by the Michigan legislature?

The Attorney General unequivocally answered "yes" to both questions. OAG, 1997, No 6,960 (October 21, 1997) (App at 43a-45a). After observing that Article 4, § 1, of the Michigan constitution vested the legislative power in the State Senate and House, the Attorney General recognized that:

> In order to protect the integrity of the legislative process, the People have, through the Constitution, imposed specific requirements upon the exercise of this power. Const 1963, art 4, § 22, requires that "all legislation shall be by bill and may originate in either house." Const 1963, art 4, § 26, requires that no bill shall become law without concurrence of a majority of the members of each house.

Id. at *5 (App at 44a). Finding that the compacts were "clearly legislative in character," the State's own legal counsel concluded that legislative approval *by bill* was necessary, *Id.* at *7-*8 (App at 45a).

Despite the Attorney General's opinion, when the Governor and the four Tribes modified and re-executed the compacts in December of 1998, the compacts again required approval only "by resolution of the Michigan Legislature." Compacts at § 11(B) (App at 62a). The compacts were nevertheless enrolled as House Bill 5872 (1998) in an apparent attempt to have them approved by legislative act. *See Baird v Babbitt,* No 5:99-CV-14, slip op at 2 (WD Mich, 1999) (App at 79a). But legislative approval for this bill never materialized either, *Id.*

So, the legislature proceeded to consider the compacts by resolution. *See* HCR 115 (1998) (App at 46a). Unlike a bill, which must be passed by a majority of *elected and serving members*, a resolution may be passed by a majority vote of legislators *present at the time*.[1] *See* Const 1963, art 4, § 26;

---

[1] Under the Michigan constitution, a house of the legislature may conduct business if there is a quorum present. Const 1963, art 4, § 14. Thus, once a quorum is present, a

Senate Rule 3.107. Casino supporters in the legislature were forced to proceed in this fashion because the compacts lacked the support necessary to gain approval by a majority of elected and serving legislators.

Indeed, when HCR 115 was first considered during the 1998 "lame duck" session of Michigan's House of Representatives, it was soundly defeated by a vote of 52 to 39. Over the next three days, the resolution was defeated twice more before finally being approved by a vote of 48 to 47. See 37 Gongwor News Service, Michigan Report No 237 (December 10, 1998) (App at 71a-74a), 1998 Journal of the House 2671-2673 (No. 83, December 10, 1998) (App at 75a-77a). The Senate eventually approved HCR 115 by a vote of 21 to 17 at 1:42 a.m. on December 11, 1998, the last day of the 89th Legislature. HCR 115 (App at 46a). Because the House had 108 elected and serving members at the time HCR 115 was considered, 55 votes were required to pass legislation. *See* 1998 Journal of the House (listing 108 members) (App at 75a); *see also Baird;* No 5:99-cv-14, slip op at 5 (noting that the House usually has 110 members, thereby normally requiring 56 votes) (App at 82a).

II. The Compacts' terms reflect policy judgments.

The four compacts in this case purport to clear the way for casino-style gambling in four communities in Michigan. Since the relevant terms of the compacts are identical, a single

---

majority of that quorum can pass a concurrent resolution. In real numbers, this means that a concurrent resolution can be passed with just twenty-eight House members and eleven Senators voting in favor, essentially half that required to pass a bill.

compact is reproduced in the Appendix at 47a-70a. The compacts were ostensibly prepared under the federal Indian Gaming Regulatory Act, 18 USC 1166-1168, 25 USC 2701-2721 ("IGRA"). Under IGRA, Indian tribes earl operate gambling casinos only if they do so in conformance with a valid "Tribal-State compact" entered into with the "State" that is "in effect." 25 USC 2710(d)(1)(C). The compacts authorized "Class III gaming" under IGRA, which includes craps, roulette, keno, slot machines, and other casino-style games. 25 USC 9 2703(8); Compacts at § 3 (App at 52a-53a).

As described more fully in the Argument below, the compacts prohibit the application of State gambling laws to the four Indian casinos, *see* Compacts at § 3(A) (App at 52a-53a), and instead establish a new regulatory scheme that governs gambling activities. For instance, the compacts prohibit gambling by any "person" under the age of 18. *See id.* at § 4(1) (App at 56a.) They also govern employee licensing, record keeping and accounting practices, the posting of certain information, and a multitude of other matters, *Id.* at §§ 4(D), 4(H), 4(K) (App at 54a-56a). The compacts decide how much money the tribes will pay to the State (8% of net win from electronic games of chance) and where that money will go (the Michigan Strategic Fund). *Id.* at § 17 (App at 17a-18a). Although the local governments affected are not parties or privy to the compacts, the compacts require them to create new "Local Revenue Sharing Boards" to manage tribal payments earmarked for local expenditures. *Id.* at § 18 (App at 18a-20a).

The compacts also allow the Governor to amend their terms without additional legislative approval of any kind. Any amendment is to be initiated and negotiated by the Indian tribe and the Governor, "who shall act for the State." Compacts at §§ 16(A)-(C) (App at 16a-17a). Exercising her apparent rights

under the compacts, Governor Granholm amended one of the compacts on July 22, 2003, granting the Little Traverse Bay Bands of Odawa Indians an additional casino in exchange for additional payments to be made "to the State, as directed by the Governor or designee." Amended Compact at § 17(C) (App at 138a).

III. Procedural History.

In the Ingham County Circuit Court, TOMAC sought a declaratory ruling that the compacts violated Michigan's constitution because (1) the compacts were legislation, (2) the State failed to consider and approve the compacts in accordance with the constitutional requirements for legislation, (3) the State failed to approve the compacts in accordance with the constitutional requirements for local acts, and (4) the compacts' terms transgressed the separation of powers between the executive and legislative branches.[2]

In its Opinion dated January 18, 2000, the Ingham County Circuit Court declared that HCR 115 was indeed legislation enacted through unconstitutional means, and that the compacts

---

[2] Prior to the action in the Ingham County Court, Representative Laura Baird, together with State Senator Gary Peters and Jackson County Treasurer Janet Roehefort, filed suit in federal district court over the approval of the compacts by the United States Secretary of the Interior. The court declined to reach the merits of the ease, finding that the plaintiffs lacked standing, a remedy under federal law, or both. But the federal court noted that the plaintiffs could seek redress in the state courts for any violations of state law. *Baird,* No 5:99-cv-14 (App at 78a-105a).

violated the separation of powers by giving the Governor unrestricted authority to amend their terms. Cir County Ct Op (App at 106a-121a). The court agreed with TOMAC on all counts except one: namely, TOMAC's claim that the compacts were improperly enacted "local acts" under Michigan's constitution. On November 12, 2002, the Michigan Court of Appeals reversed the Circuit Court's ruling that the compacts were unconstitutionally enacted. Ct of Appeals Op at 12-14 (App at 133a-135a). The court also determined that the separation of powers issue was not ripe for review and that the compacts were not local acts. *Id.* at 14 (App at 135a). TOMAC now asks this Court to declare that the "passage" of HCR 115 was unconstitutional, and direct that any gambling compacts be approved, if at all, by legislative enactment, and not by resolution.

STANDARD OF REVIEW

The underlying Circuit Court Opinion and Order resolved cross motions for summary disposition under Michigan Court Rules 2.116(C)(8) and 2.116(C)(10). This Court reviews opinions and orders deciding motions for summary disposition *de novo. See Spiek v Michigan Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Although duly enacted legislation is entitled to a presumption of constitutionality, *see Young v Ann Arbor,* 267 Mich 241, 243; 255 NW 579 (1934), the State and the Interveners cannot benefit from the presumption here because they assert that HCR 115 is not and need not be legislation. TOMAC has found no case affording any presumption in favor of concurrent resolutions, and submits to this Court that none should be applied.

ARGUMENT

I. IGRA expressly gives States a vehicle to apply judgments regarding public policy to Indian gambling.

In *California v Cabazon Band of Mission Indians,* 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987), the United States Supreme Court determined that in the absence of an express federal law allowing state regulation of gambling in Indian country, the State of California could not regulate such gambling. In reaching this conclusion, the Court stated that "it is clear ... that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided," but ruled that Congress had not yet acted to make state laws applicable to tribal gambling operations. *Id.* at 207. In response, Congress enacted IGRA to give the states a role in regulating Indian gambling. *See Keweenaw Bay Indian Community v United States* 136 F3d 469, 472 (CA 6, 1998) ("Congress enacted the IGRA in 1988 and thereby created a framework for the regulation and management of gambling on Indian land ... which included a role for the states in the regulation of Indian gaming ....").

When Congress enacted IGRA, it recognized the preeminent regulatory and policy-making role of states: "'there is no adequate Federal regulatory system in place for Class III [casino-style] gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place' and thus 'a logical choice is to make use of the existing State regulatory systems.'" *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1549 (CA 10, 1997) (quoting S Rep No 100-446, at 13-14), *cert den* 522 US 807; *see also* 25 USC 2701(3) ("[E]xisting Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands.").

Congress further recognized that a state has significant governmental interests in tribal gambling within its borders:

> As the legislative history of IGRA makes dear, '[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Saratoga County Chamber of Commerce Inc v Patald, 740 NYS2d 733, 737; 293 AD2d 20 (NY App Div, 2002) (quoting S Rep No 100-446, at 13), *aff'd as modified* 2003 NY Lexis 1470; NE2d ___ (NY, 2003); *accord Pueblo of Santa Ana,* 104 F3d at 1554 (quoting S Rep No 100-446, at 13).

Congress ensured state regulatory and policy-making involvement under IGRA in at least two ways. First, in the absence of a duly enacted compact, Congress expressly made state gambling laws applicable in Indian country: "(a) Subject to subsection (c) [providing for compacts] for purposes of Federal law, *all State laws* pertaining to the licensing, regulation, or prohibition of gambling ... shall apply in Indian country ..." 18 USC 1166 (emphasis added). This express determination by Congress reversed the impact of *Cabazon* and ensured a meaningful role for state policy in regulating Indian gaming.

Second, Congress provided the compacting process as an additional means of applying state policy. Under IGRA, Indian casino gambling is allowed *only* if conducted in conformance with a tribal-state compact. *See* 25 USC 2710(d)(1), *Pueblo of Santa Ana,* 104 F3d at 1553; *see also*

United States v Santee Sioux Tribe of Nebraska, 135 F3d 558 (8 CA, 1998) (ordering closure of Indian casino operating without compact in violation of Nebraska laws). As explained in the legislative history:

> It is also true that S. 555 [IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact. In adopting this position, the Committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled.

Select Committee on Indian Affairs Report, S Rep No 100-446, at 1-6 (emphasis added); *accord Kansas v Finney,* 251 Kan 559, 561-562; 836 P2d 1169 (1992) (quoting same). Moreover, IGRA expressly recognizes that an appropriate compact may apply state law to Indian gambling:

> (3)(c) Any Tribal-State compact ... may include provisions relating to-
>
> (i) *the application* of the criminal and civil *laws and regulations* of the Indian tribe *or the State* that are directly related to, and necessary for, the licensing and regulation of such activity;

25 USC 2710(d) (emphasis added). Under the IGRA framework, the tribal-state compact is a tool that enables a state to apply its policy decisions to Indian gambling conducted within the state's borders.

II. Compacts are both legislative and contractual in nature, and must be authorized by legislative enactment.

Compacts are a unique form of legislative action that "are both statutory and contractual at the same time." *State v Svenson,* 104 Wash 2d 533, 538; 707 P2d 120 (1985). *See also Aveline v Pennsylvania Board of Probation and Parole,* 729 A2d 1254, 1257 (Pa, 1999) (explaining that compacts function simultaneously as contracts and statutes); Hasday, *Interstate Compacts in a Democratic Society: the Problem of Permanency,* 49 Fla L Rev 1, 3 (Jan, 1997). The dual nature of compacts is described in the Council of State Government's manual on compacts. Zimmerman & Wendell, *The Law and Use of Interstate Compacts* (Council of State Governments, 1976), pp 1-3, 8, 34-35 (hereinafter "Zimmerman & Wendell") (App at 141a-142a, 145a, 158a.) Like any other statute, a compact supercedes prior law. Zimmerman & Wendell, p 27 (App at 154a). Moreover, because a compact is also a contract that cannot be impaired by the State, it takes precedence over subsequent statutes as well. *Id.; Aveline,* 729 A2d at 1257 n 10. A State may not unilaterally nullify, revoke or amend a compact unless the Compact so provides. *Aveline,* 729 A2d at 1257 n 10, Hasday, 49 Fla L Rev at 3.

States may enter into compacts in one of two ways. First, a state may enact the compact's terms by statute. *See Sullivan v Pennsylvania,* 550 Pa 639, 648 n 7; 708 A2d 481 (1998). Second, a state may pass a law authorizing a state agency or committee to enter into a compact, *see e.g., National Transportation, Inc v Howlett,* 37 Ill App 3d 249, 252; 345 NE2d 767 (1976), although in such a case the authorizing legislation must contain appropriate standards and substantive provisions to support the delegation of legislative power. *See Sullivan,* 550 Pa at 647-648. In any event, as a general

matter, whenever a state enters into a compact, it does so by bill. Zimmerman & Wendell, pp 12-13, 19-20, 34-36 (App at 147a, 150a-151a, 158a-159a).

The Michigan legislature's own research division, the Legislative Service Bureau, confirms that compacts "are usually set forth in state statutes" but that compacts may also be "created by the use of enabling legislation." Michigan Legislative Service Bureau, *Interstate Compacts,* pp 5-6 (App at 5a-6a). In noting the dual nature of compacts, the Bureau remarked: "Not only *is a compact a statute,* but it also has the binding legal features of a contract." *Id.* at 3 (emphasis added) (App at 3a). Aside from the State's gambling compacts under IGRA, neither TOMAC nor the Michigan Legislative Service Bureau has been able to find any other instances in which the State has entered into a "compact" that was not either authorized by statute before or approved by statute after negotiation.[3]

---

[3] The following is a list of Michigan's compacts (as codified) and statutes authorizing compacts: Compact concerning boundaries between Minnesota, Wisconsin and Michigan, MCL 2.201; Midwest Interstate Low-level Radioactive Waste Compact, MCL 3.751; Interstate Agreement on Qualification of Educational Personnel, MCL 388.1371; Pest Control Compact, MCL 286.501; Great Lakes Basin Compact, MCL 324.32201; Interstate Agreement on High Speed Intercity Rail Passenger Network, MCL 462.71; Interstate Insurance Receivership Compact, MCL 550.11; Interstate Compact on Mental Health, MCL 330.1920; Midwestern Higher Education Compact, MCL 390.1531; Multistate Tax Compact, MCL 205.581; Interstate Compact on Juveniles, MCL 3.701; Interstate Compact on the Placement of Children, MCL 3.711; Interstate Agreement on

In the instant case, however, the legislature departed from this long-established State and national precedent to "approve" the compacts by mere resolution.

III. House Concurrent Resolution 115 is unconstitutional because approving the compacts is a legislative act requiring action by bill.

A. Michigan law prohibits the use of a concurrent resolution to sidestep the legislative process.

Article IV, Section 22, of Michigan's constitution provides that "all legislation shall be by bill and may originate in either house." This language has been a part of Michigan's constitution since 1908, when it was added to curb inappropriate legislative practices: "prior to [1908] the Legislature used concurrent and joint resolutions in the

---

Detainers, MCL 780.601; Tri-Static High Speed Rail Line Compact, MCL 462.81; Compact For Education, MCL 388.1301; Interstate Disaster Compact, MCL 30.261; Authorization to enter interstate agreement for employment of state military forces in other states, MCL 32.559; Authorization to enter interstate corrections compact, MCL 3.981; Authorization to enter reciprocal aid agreement with other states, MCL 30.404; Authorization to enter interstate compact to Conserve oil and gas, MCL 324.62101; Authorization to enter interstate compact concerning regulation of vehicles on public highways, MCL 3.163; Authorization to enter interstate compact for crime prevention, MCL 798.103; Authorization to enter interstate compact conceming probation and parole, MCL 798.101; Authorization to negotiate compact relating to weather modification, MCL 295.107.

lawmaking process to such an extent that it was deemed to have been abusive." State of Michigan Constitutional Convention of 1961, Official Record 766 (Austin C. Knapp ed.). In this case, legislators "passed" a law by concurrent resolution in an attempt to circumvent these constitutional requirements and safeguards. But, as Justice Thomas Cooley wrote:

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential.

1 Cooley, Constitutional Limitations (8th ed), p 266; *see also Becker v Detroit Savings Bank*, 269 Mich 432, 435; 257 NW 853 (1934) (quoting Cooley).

The proper modes of action for passing legislation are set forth in Michigan's constitution, and they are unambiguous in scope and content:

Article IV, Section 22:

All legislation shall be by bill and may originate in either house.

Article IV, Section 23:

The style of the laws shall be: The People of the State of Michigan enact.

Article IV, Section 26:

> No bill shall be passed or become law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. *No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house* ....
>
> **Article IV, Section 33:**
>
> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it
> ....

Const 1963 (emphasis added).

These procedures are intended to engender responsible legislation worthy of the public trust. *See Alaska v ALIVE Voluntary,* 606 P2d 769, 772 (Alas, 1980). For instance, requiring a specific form of enactment (i.e., "The People of the State of Michigan enact") is to "avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires." *Id.* The five-day waiting period allows citizens to learn of proposed legislation before it is passed and prevents hasty and careless acts. State of Michigan Constitutional Convention of 1961, Official Record 2334-2335 (Austin C. Knapp ed.). As one constitutional delegate succinctly put it: "Action taken in haste is likely to prove itself not in the best interest of the people." *Id.* The requirement that no law be passed without the concurrence of

a *majority* of the elected members goes to the very heart of our representative system of government. Consequently, TOMAC is especially troubled that only 48 votes were cast in favor of the compacts in the house of representatives, well short of the 55-vote majority constitutionally required to pass legislation.

Courts, including this Court, have enforced these constitutional requirements by invalidating resolutions that skirt legislative procedures. In the seminal case *Immigration and Naturalization Service v Chadha,* 462 US 919; 103 S Ct 2764; 77 LEd 2d 317 (1982), the United States Supreme Court considered the constitutionality of a resolution passed by the United States House of Representatives that would have resulted in the deportation of immigrant Jagdish Rai Chadha and five others. The Court found that the resolution in *Chadha* "had the purpose and effect of altering the legal fights, duties, and relations of persons, including the Attorney General, Executive Branch officials, and Chadha, all outside the Legislative Branch" and therefore was de facto legislation that failed to follow constitutional procedures, *Id.* at 952. Thus, the Court struck down the House's resolution, aptly noting that the legislative process is intended to be a step-by-step, deliberate and deliberative process: "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959.

Simply put, the legislature may not do indirectly what it cannot do directly. This was the conclusion of the Michigan Court of Appeals in *Blank v Department of Corrections,* 222 Mich App 385; 564 NW2d 130 (1997), *aff'd in part* 462 Mich 103 (2000). There, the court considered the constitutionality of a statutory provision that allowed a joint committee of the

legislature ("JCAR") to veto administrative roles, with the qualification that such a veto could be superseded by a concurrent resolution of the legislature. In its analysis, the court underscored the procedural requirements found in Article 4 of Michigan's constitution, including the requirement that all legislation be "by bill" and that all bills be passed by a majority of the members serving in each house. The court determined that the JCAR was an impermissible "smaller legislative body" unconstitutionally "legislating" outside the confines of Article 4. *Id.* at 397.

The *Blank* court also condemned the use of concurrent resolutions, reasoning that resolutions are not "bills" and therefore are not an effective mode of legislative action. Thus, "when the Legislature acts by concurrent resolution, it is not making 'law.'" *Id; accord, Becker,* 269 Mich at 434-435 (noting that a mere resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.") (quoting *Mullah v California,* 114 Cal 578; 46 P 670 (1896)).

This Court affirmed the *Blank* decision and expressly adopted the United States Supreme Court's reasoning in *Chadha. See Blank v Department of Corrections,* 462 Mich 103, 114; 611 NW2d 530 (2000). In so doing, this Court emphasized that "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation," not by concurrent resolution, *Id.* at 119. Although there was no single majority opinion in *Blank,* a majority of four justices adopted the *Chadha* analysis. *See Blank,* 462 Mich at 114-122

(Opinion of Justice Kelly, joined by Justices Corrigan and Young), 129-30 (Opinion of Justice Weaver, concurring).[4]

Moreover, even the two Justices who did not adopt the *Chadha* analysis[5] recognized the need for some proper legislative enactment to stand behind the action of the legislature. Justice Markman concurred in the judgment of the Court striking down the JCAR resolution process on the particular facts of the ease using a rationale that would not permit the legislature to use a resolution in the absence of *some prior statutory enactment* that properly authorizes its use. Even Justice Cavanagh, in dissent, agreed that a prior statutory enactment was necessary to authorize the resolution process. *Blank,* 462 Mich at 153-178. As he emphasized in his dissent:

> [the Michigan Administrative Procedures Act] became law *as a product of the normal legislative process: enactment by introduction and passage of a bill that* was eventually presented to and signed by the Governor ... The enabling statute that conferred rulemaking power upon the Dec in the first place was also enacted pursuant to constitutional procedures.

---

[4] Binding precedent is created in a plurality decision if a majority of Michigan Supreme Court justices agree on a grounds for decision. *See People v Stevens,* 461 Mich 655, 663 n 7; 610 NW2d 881 (2000), *cert den* 531 US 902. The only decisions that are not binding under the doctrine of *stare decisis are* those in which no majority of justices agree. *See People v Gahan,* 456 Mich 264, 274; 571 NW2d 503 (1997).

[5] Justice Taylor did not participate in the *Blank case.*

Blank, 462 Mich at 155 (emphasis added).[6] Thus, all justices in *Blank* recognized the constitutional need for some statutory enactment, an element entirely lacking in the legislative process leading up to the "approval" of the compacts by resolution here.

This makes the present ease even more compelling than *Blank.* Unlike *Blank,* which dealt with the use of committee vetoes and concurrent resolutions *authorized by Michigan statute,* this case involves no legislative enabling act at all. Rather, by resolution of less than a majority of elected and serving members of the house, HCR 115 authorizes four new casinos that would otherwise be illegal. There was *no* normal legislative process and *no* bill enacted using constitutionally mandated procedures. To the contrary, the legislative attempt to approve the compacts by bill failed.

B. "Legislation" is any rule that is binding on those outside the legislature, implements public policy, and supplants other forms of legislative action.

In Blank, this Court defined "legislation" as any action that (1) "has the power to alter the rights, duties, and relations of parties outside the legislative branch," (2) "involves policy determinations,"[7] and (3) "supplants other legislative

---

[6] The resolution at issue in *Chadha,* too, was authorized by Congressional Act, specifically the Immigration and Nationality Act, 8 USC 1254. *Chadha,* 462 US at 923.

[7] The legislature is, after all, the final arbiter of the State's public policy. *Michigan Gaming Inst, Inc v State Bd of Educ,* 451 Mich 899; 547 NW2d 882 (1996) (adopting dissenting opinion of *Michigan Gaming Inst, Inc v State Bd of Educ,* 211 Mich App 514, 522; 536 NW2d 289 (1995)). *See also*

methods for reaching the same result." *Blank,* 462 Mich at 112-120.[8] Whether an act is legislation depends not on its form, but upon whether it contains "matter which is properly to be regarded as legislative in its character and effect." *Chadha,* 462 US at 952.

Applying this standard, the *Blank* Court found that the concurrent resolution power (together with the committee veto power at issue) amounted to "legislation" because such resolutions: (1) affected the duties of individuals outside the legislative branch (specifically, the Director of the Department of Corrections, who had promulgated the new administrative roles involved), (2)involved policy decisions (i.e., whether or not to sanction the "inevitable policy issues" enveloping the proposed rules), and (3) supplanted other

---

American States Ins Co v Detroit Auto Inter-Ins Exch, 117 Mich App 361, 367; 323 NW2d 705 (1982) ("Policy making is fundamentally a legislative prerogative"). The United States Supreme Court has reasoned: "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct ...." *Yakus v United States*, 321 US 414, 424; 64 S Ct 660; 88 L Ed 834 (1944).

[8] *See also In re Manufacturer's Freight Forwarding Co,* 294 Mich 57, 63; 292 HW 678 (1940) ("[L]egislation ... looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.") (quoting *Prentis v Atlantic Coast Line Co,* 211 US 210; 29 S Ct 67; 53 L Ed 150 (1908) (Holmes, J)).

legislative modes of action (i.e., accepting or amending the rules by bill). *Blank,* 462 Mich at 114-117.

C. The compacts are "legislation."

Even more so than the concurrent resolutions in *Blank,* HCR 115 amounts to legislation. As contemplated by IGRA, the compacts adopted and "enacted" by HCR 115 impact State public policy, create new rules and obligations binding on those outside the legislature, and supplant the constitutionally required mode of approval by bill. Among other things, HCR 115:

- *creates an entire regulatory scheme for Indian gaming* in Michigan substantially different than the regulatory scheme defined by Michigan law and made applicable to the tribes by federal law;

- *determines the jurisdictional balance* between the State of Michigan and the tribes;

- *determines how many casinos each tribe will be allowed to have in Michigan*;

- *sets the minimum age for casino gambling at eighteen* - a significant change from Michigan's current policy, which prohibits casino gambling by anyone younger than twenty-one;

- *decides how much revenue to raise for the State and where that revenue will go;*

- *bars casinos within 150 miles of Detroit* to protect the Detroit casinos from competition, but does not

protect other entertainment or business venues from competition; and

- *creates new local units of government*, known as "Local Revenue Sharing Boards," to receive and distribute what amounts to a local tax on the tribes.

Indeed, in the absence of the compacts, the gambling allowed by compact would be a crime. *See* 18 USC 1166; *see also United States v Cook,* 922 F2d 1026, 1034 (CA 2, 1991) (affirming conviction for operation of slot machines on Indian lands in violation of New York law). It is no wonder the Attorney General of Michigan, in response to a question from the legislature, declared that the compacts are "clearly legislative in character" requiring enactment by bill. OAG, 1997, No 6,960, p *5 (October 21, 1997) (App at 44a).

1. The compacts make policy decisions.

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice ....

Rodriguez v United States, 480 US 522, 526; 107 S Ct 1391; 94 L Ed 2d 533 (1987).

a. Gambling involves important decisions of public policy.

Decisions regarding gambling are public policy decisions. This truth rings clear in Justice (then Judge) Corrigan's dissenting opinion in *Michigan Gaming Inst, Inc v State Bd of Education,* later adopted by this Court, in which Justice Corrigan emphasized the connection between gambling, public policy, and the legislature's enactments:

> The legislature is the final arbiter of this state's public policy. The quintessential political judgment whether to alter the quality of our collective life in Michigan in legalizing casino gambling should occur in the political branch. Unless and until the people's elected representatives east their votes to change our state's longstanding policy against casino gambling, petitioners application is premature.

Michigan Gaming Institute, 211 Mich App 514, 522; 536 NW2d 289 (1995) (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996); *see also United States v Washington,* 879 F2d 1400, 1401 (CA 6, 1989) ("It was rational for the Michigan legislature to choose to attack only the dangers presented by private lotteries (such as

cheating, fraud, and particularly the involvement of organized crime).").

It is not just the decision *whether* to permit gambling that involves State policy, but also *how* gambling will be conducted, if permitted. Thus, when the legislature has carved out exceptions to its general prohibition against gambling,[9] it has either strictly limited or "highly regulated" the excepted activities, making policy choices regarding who, when, and where such gaming will be allowed. *See Michigan Gaming Institute,* 211 Mich App at 522 (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996); see, e.g., MCL 432.201 *et se(l.* (regulating the Detroit casinos), MCL 432.101 *et seq.* (regulating charitable gambling).

For instance, setting the minimum age for gambling is a matter of public policy. Policy considerations might include the impact on schools and truancy, the fact that alcohol is served in casinos, and the susceptibility of minors to gambling problems and addiction. The compacts, without legislative enactment, set the age for tribal gambling in Michigan at eighteen. *See* Compacts at § 4(I) (App at 56a). The trial court properly identified this decision as a matter of State policy:

---

[9] The general rule in Michigan is that gambling is illegal. For example, under the Michigan Penal Code, individuals can be fined or jailed for taking bets, maintaining a residence for gambling, or running a gambling room. *See* MCL 750.301 - 750.303. Frequenting a gambling site is a misdemeanor. *See* MCL 750.309. The Michigan legislature has also deemed any place used for "lewdness, assignation of prostitution or gambling" a public nuisance. MCL 600.3801.

> There are several aspects of the compacts that have the hallmarks of legislation. Perhaps the most remarkable provision the State has approved, via the compacts, is that a person of the age of 18 may lawfully engage in casino style-gambling, an act generally prohibited by Michigan law. Section 18 of the Michigan Gaming Control and Revenue Act, being MCL 432.201 *et seq;* MSA ____, makes it a misdemeanor for a person under the age of 21 to engage in casino-style gambling. This act excludes from its application gambling on Indian territory. Section 3(2)(d). However, the Court finds instructive that the Legislature has previously made similar policy decisions, e.g. age of person who may lawfully engage in casino gambling, through Legislation.

Cir County Ct Op at 9-10 (App at 114a-115a). In the end, the State could have pursued an age limit of twenty-one, sixteen, twelve, or no age limit at all, depending on its policy goals. This important matter warrants full participation of the legislature, full accountability, and enactment by bill.

b. The compacts create an extensive regulatory scheme.

As with other exceptions to Michigan's general prohibition against gambling, the compacts set forth an extensive regulatory framework governing tribal gaming activities. Compacts at §§ 3-10 (App at 52a-61a). The compacts specify who may be hired, the types of games that may be played, and who may wager at such games. *Id.* at §§ 3 (D), 40) (App at 52a-56a). The compacts also set forth accounting and record keeping requirements, requirements for posting information in casinos, and standards for gambling supplies and equipment purchased by the tribes. *Id.* at

§§ 4(H), 4(K), 6 (App at 55a-59a). Even the Court of Appeals in this case acknowledged that "[t]he terms of the compact contained various regulatory provisions." Ct of Appeals Op at 2 (App at 123a).

Comparing provisions in the compacts with statutory provisions regulating the three non-Indian casinos permitted in Detroit underscores this point. The compacts cover the same regulatory ground and, in some instances, make policy choices that differ from the choices applicable to the three Detroit casinos:

Compacts

> No person *under the age of 18* may participate in any Class III game. Compacts at § 4(1) (App at 56a).
>
> The Tribe may not license, hire, or employ as a key employee or primary management official ... in connection with Class III gaming, any person who: ... (3) Has been convicted of or entered a plea of guilty or no contest to any offense not specified in subparagraph (2) *[gambling related offense, fraud or misrepresentation]* within the immediately- preceding five years. Compacts at § 4(D) (App at 54a).
>
> The Tribe may not license, hire, or employ as a key employee or primary management official ... in connection with Class III gaming, any person who: (1) Is under the age of 18 ... Compacts at § 4(I)) (App at 54a).

Michigan Gaming Control & Revenue Act

> A person *under age 21* shall not be permitted to make a wager under this Act. MCL 432.209(9).
>
> A casino licensee shall not employ an individual as a managerial employee who has been convicted *of a felony in the* previous 5 years .... MCL 432.209(14).
>
> To be eligible for an occupation license, an applicant shall: (a) Be *at least 21 years of age* if the applicant will perform any function involved in gaming by patrons. MCL 432.208(3).

Such regulatory provisions are hallmarks of legislation. To emphasize this point, TOMAC notes **that** when Michigan law changed to allow casino gambling to take place, it was by a vote of the citizens of the State, it was specifically tailored to allow gambling to take place only in Detroit, and it was followed by implementing legislation that set up a State regulatory scheme. It was not done by concurrent resolution.

c. The compacts determine the number of casinos.

Another policy decision in the compacts is the number of casinos that will be authorized: i.e., how much should the State encourage or discourage the proliferation of gambling? In making such a policy decision, legislators might consider the impact of casinos on gambling addiction, crime, tourism and competing businesses like entertainment venues and restaurants, weighed against the State's need to raise revenue. Although a majority of elected representatives have never determined that the compacts strike the proper balance on this issue, the compacts as originally "approved" limit each tribe to one casino. Compacts at § 203) (App at 51a-52a).

The number of permitted casinos, however, is subject to change without legislative approval. Governor Granholm recently amended the Odawa Indian compact to give the Odawa an additional casino in exchange for additional payments to the State. (Amended Compact, App at 136a-139a.) Thus, it appears that at least the Granholm Administration has made the policy decision to favor additional casinos to raise State revenue. Whether a majority of legislators agree with this policy decision is unknown and, according to the terms of the compacts, irrelevant because the Governor has the putative power to make this key policy choice entirely on her own, thus bypassing the normal legislative process.

d. The compacts set State policy governing the balance of legal jurisdiction between the State and tribes.

Nor was the normal legislative process used to strike the important balance between State and tribal jurisdiction in the compacts. As a general rule, jurisdictional issues **are** addressed through law. *See Straus v Barbee,* 262 Mich 113, 114; 247 NW 125 (1933) (ruling that "[j]urisdiction arises from law, and not from consent"), *Goldberg v Trustee of Elmwood Cemetery,* 281 Mich 647, 649; 275 NW 663 (1937) (declaring that parties cannot by consent deprive the court of jurisdiction conferred by statute). As mentioned above, IGRA applies State gambling law to Indian lands in the absence of a compact, *see* 18 USC 1166, and expressly authorizes the incorporation of State civil or criminal laws in compacts, see 25 USC 2710(d)(3)(C). IGRA further provides that compacts may contain provisions relating to "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 USC 2710(d)(3)(C). Thus, as a matter of public policy and

legislative prerogative, a State must decide what jurisdictional balance it will agree to in the compact and negotiate a compact that best reflects that policy. Policy considerations might include the State's interest in protecting its citizens by retaining control over enforcement, the availability of State resources to take on additional criminal or civil jurisdiction, and issues of sovereignty.

The Brief filed by Amicus Curiae Senate Majority Leader Ken Sikkema and Appropriations Chair Shirley Johnson acknowledges that the compacts strike a jurisdictional balance between the State and the Tribes:

> [T]he original Compact adopted by the Michigan Legislature reflected a specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class HI gaming activities, the licensing of its operators, the regulation of alcoholic beverages, imposition of age requirements for participation in gaming activities, revenue payments, and the respective civil and criminal jurisdictions for the State and the Tribe necessary for the enforcement of state or tribal laws or regulations.

(Amicus Curiae Brief at 18-19.) These "policy determinations," *(id.* at 19), effectively determine the applicability and reach of Michigan's laws and jurisdiction. This is a balance that must be struck by legislative enactment with a majority of elected and serving legislators, not through approval by resolution of less than a majority of legislators.

In *New Mexico v Johnson*, 120 NM 562; 904 P2d 11 (1995), the New Mexico Supreme Court invalidated IGRA compacts "approved" without an act of the legislature as an Unconstitutional "attempt to create new law" because, among

other things, the compacts struck a "balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of operators, and respective civil and criminal jurisdictions ...." *Id.* at 573-574. According to the Court, "the actual balance that is struck represents a legislative function." *Id.* at 574. New Mexico has since enacted a statute setting forth the specific terms of the IGRA compacts. *See NM* Stat Ann 11-13-1.

In this ease, the compacts strike the balance in favor of unfettered gambling by the tribes: "Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact." Compacts at § 3(A) (App at 52a-53a). IGRA itself makes State gambling laws applicable in Indian country in the absence of a compact. *See* 18 USC 1166. A minority of legislators has effectively repealed the application of these laws to Indian lands and left the State without jurisdiction over the tribal gambling operations. This kind of policy decision requires a legislative enactment passed by a majority of elected and serving legislators.

e. The compacts make policy decisions by raising and spending State revenue.

As this Court has previously noted, "[T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and *not to be surrendered or abridged,* save by the Constitution itself." *Civil Service Comm'n of Michigan v Auditor General,* 302 Mich 673, 682; 5 NW2d 536 (1942) (emphasis added). Here, the gambling compacts, passed by mere resolution, require the tribes to pay 8% of **net** wins from electronic games of

chance into the Michigan Strategic Fund ("MSF"). Compacts at § 17 (App at 65a-66a).[10] This 8% payment likely represents hundreds of millions of dollars over just the twenty year period that the compacts are initially effective.[11] How to raise and spend millions of dollars is part of the legislature's right and responsibility to "determine the sources from which public revenues shall be derived and the objects upon which they shall be expended" as provided by law. *Civil Service Comm'n of Michigan,* 302 Mich at 682. This legislative determination requires a legislative enactment.

f. Conclusion: the policy decisions in the compacts are legislative in nature.

---

[10] The Court of Appeals has held that the MSF is a quasi public corporation apparently not subject to the constitutional rules regarding legislative appropriations. *Tiger Stadium Fan Club v Governor,* 217 Mich App 439, 452; *553* NW2d 7 (1996). *Tiger Stadium* held that the Appropriations Clause of the Michigan constitution did not require that a bill be passed in order to send Indian gambling payments to the MSF. However, *Tiger Stadium* did not consider the issue here: namely, whether the compacts themselves amount to legislation given the reasoning of *Blank* (which was decided after *Tiger Stadium).* In any event, Governor Granholm's amendment to the Odawa's Compact makes this case factually distinguishable from *Tiger Stadium, as the funds are* no longer directed to the MSF. *See* Amended Compact (App at 136a-139a).

[11] Just two casinos operating from 1999 to 2003 contributed over $34 million to the MSF. *See* http://www.michigan.gov/documents/8__percent_Payments__76616_7.pdf.

In sum, Congress granted an important policy-making role to States for addressing the many societal issues raised by tribal gambling. The legislature, as the "final arbiter of this state's public policy,[12] has a responsibility to follow the legislative process in evaluating the policy choices made in the compacts. As recognized by the trial court below, the legislature abdicated its duty to legislate:

> While it is not this Court's place to pass judgment on this public policy; this ease involves just that - an issue of public policy. As such, it is for the people of the State, via their representatives in the Michigan Legislature, to determine the State's policy regarding gambling. Therefore, when the Legislature changes its longstanding policy regarding casino-style gambling, it must do so through enactment of legislation and all the procedures pertaining thereto.

Cir County Ct Op at 2 (App at 107a).

2. The compacts create new rules and impose additional duties on those outside the legislature.

The compacts also meet the definition of "legislation" set forth in *Blank* because they alter the rights, duties and relations of parties outside the legislative branch. The compacts set forth a variety of requirements applicable to

---

[12] *Michigan Gaming Institute*, 211 Mich App at 522 (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996).

"persons"[13] outside the legislature. For example, as noted above, the compacts make casino gambling and employment legal for an entire class of citizens—those who are aged 18, 19 and 20--for whom casino gambling and employment is ordinarily prohibited under Michigan's regulatory scheme. *Compare* Compacts at §§ 4(D), 4(1) (App at 6a-8a) *with* MCL 432.209(9). The compacts also establish background requirements applicable to any person seeking employment at the casino. Compacts at § 4(D) (App at 6a-Ta). All of these regulatory provisions create new rules of conduct applicable outside the legislature.[14]

The compacts also create additional State rights that did not exist before. For instance, according to the compacts, the State now has the right to inspect tribal facilities and records. Presumably, a State employee outside the legislature would carry out such activities. The compacts reimburse the State for these activities up to $50,000 a year. *Id.* at § 4(M)(5) (App at 58a). The compacts also require the tribes to make "semi-

---

[13] The term "person" is defined broadly to mean: "a business, individual, proprietorship, firm, partnership, joint venture, syndicate, trust, labor organization, company, corporation, association, committee, state, local government, government instrumentality or entity, or any other organization or group of persons acting jointly." Compacts at § 2(D) (App at 52a).

[14] Note that the State's policy choices affect not only non-Indian citizens of Michigan, but also members of the tribes themselves, who are also citizens of the State. *See Iowa Mutual Ins Co v LaPlante,* 480 US 9, 107 S Ct 971; 94 L Ed 2d 10 (1987).

annual payments to the State." *Id.* at § 17(C) (App at 65a-66a).

Moreover, many of the compacts' requirements involve State or local government activity occurring off-reservation. For example, the compacts are binding on "the State" as a whole. *Id.* at § 12(A) (App at 62a). Among other things, the compacts bind "the State" to secrecy regarding certain types of financial and proprietary information concerning Indian tribes and their members, *Id.* at § 4(M)(3) (App at 57a-58a). This requirement undoubtedly applies to all branches and agencies of the State, not just the legislature The compacts also protect the Detroit casinos from competition. They restrict the tribal casinos to an area 150 miles (90 miles for the Calhoun County casino) outside of Detroit. *Id.* at § 16(A)(iii) (App at 64a). And they restrict the Tribes from having any Indian lands taken into trust in the restricted area. *Id.* at § 16(A)(iii) (App at 64a).

Perhaps most remarkably, the compacts also subject local units of government to a new set of requirements and procedures. Specifically, the compacts obligate the four host communities to establish "Local Revenue Sharing Boards" to receive and disburse what amounts to a 2% tax assessed on the Indian tribe's operations and impose additional duties on County Treasurers:

SECTION 18. Tribal Payments to Local Governments

> (A) From and alter the effective date of this Compact ... the Tribe will make semi-annual payments to the treasurer for the county described in paragraph (ii)(l) of this subsection 18(A) to be held by said treasurer for and on behalf of the Local Revenue Sharing Board described below, as follows:

(i) Payment in the aggregate amount equal to two percent (2%) of the net win at each casino derived from all Class III electronic games of chance, as those games are defined in this Compact. The county treasurer shall disburse the payments received as specified by lawful vote of the Local Revenue Sharing Board.

(ii) It is the State's. intent, in this and its other Compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the Class III gaming facility. *To this end, a Local Revenue Sharing Board shall be created by those local governments in the vicinity of the Class 111 gaming facility to receive and disburse the semi-annual payments from the Tribe as described below. Representatives of local governments in the vicinity of the Class 111 gaming facility shall be appointed by their respective elected body and shall serve at the pleasure of such elected body.*

Id. at § 18 (emphasis added) (App at 66a-67a). The compacts dictate the creation of a Board, the makeup of the Board and how the Board will spend the new local revenue. *Id.* at § 18 (App at 66a-68a).

The creation of Local Revenue Sharing Boards is a prime example of the compacts' legislative "character and effect." TOMAC is unaware of any other instance in which the State has created a new unit of local government by a contract

approved by mere resolution. Indeed, the very suggestion seems absurd. Michigan's constitution is replete with instances authorizing the creation of local units of government by bill. *See e.g.*, Const 1963, art 7, §§ 2, 7, 14. There is no provision permitting creation of a local unit of government by contract.

HCR 115 and the compacts it purports to approve meet this Court's definition of legislation, set forth in *Blank,* necessitating action by bill. Michigan's Attorney General concisely summed up this inquiry and conclusion:

> A major purpose of the proposed compacts is to authorize the Indian tribes to conduct specific casino gaming activities that would, absent the compacts, be in clear violation of several Michigan statutes. The proposed compacts further establish numerous requirements to be met in the management and operation of Indian gaming facilities, regulate the types and sources of gaming equipment that may be used, provide for arbitration of disputes that may arise under the compacts, subject the gaming operations to slate liquor licensing and control laws, and 66remit the tribes to make semi-annual payments to the state and to local units of government. These provisions, purporting to be binding upon the state, are clearly legislative in character.

OAG, 1997, No 6,960, pp *4-*5 (October 21, 1997) (App at 44a). Because the compacts are legislation, the legislature's "approval" of the compacts by HCR 115 was unconstitutional.

3. HCR 115 supplants other appropriate modes of legislative action.

House Concurrent Resolution 115 also violates the final test in *Blank*, because it supplants the appropriate and constitutionally mandated modes of legislative action. *Blank*, 462 Mich at 117. As noted in more detail above, the compacts change legislatively enacted laws that otherwise prohibit casino gambling at the locations approved in the compacts. Given the policy decisions made in the compacts and the impact they have on the State and its residents, the tribes, and the local communities in which the casinos will operate, these compacts are legislative in nature and require approval by bill. Moreover, passage by bill has been established by law, treatise, and historical practice as the appropriate means to approve compacts. See Argument Section 11, *supra* at 10-12. As it has done in the past with compacts, the legislature should have approved these compacts by bill, or the legislature should have enacted enabling legislation authorizing the State to enter into compacts.

Indeed, the Michigan legislature considered and rejected an enabling act in 1988 that would have created a "tribal-state commission" to negotiate and enter into IGRA compacts, such as the compacts at issue. SB 1061 (1988) (App at 39a-42a). And, after Michigan's Attorney General ruled that the compacts were "legislative," the legislature also considered but failed to approve the compacts by bill. *See Baird,* No 5:99-cv-14 (App at 78a-105a). Only after proponents tried and failed to enact the compacts through the appropriate mode did they resort to a resolution. This is the same impermissible use of concurrent resolution that was struck down in *Chadha* and the same circumvention of the legislative process that was invalid in *Blank*.

As mandated by *Blank*, the legislative mode of action was clearly the appropriate mode for approving the compacts. This required a bill, styled to say "The People of the State of

Michigan enact," printed and reproduced and in possession of each house for at least five days, read three times, approved by a majority of the members elected to and serving in each house, and then presented to the governor. Const 1963, art 4, §§ 22, 23, 26, 33. Instead of following the constitutionally required method designed to ensure responsible legislation, the proponents of HCR 115 circumvented the constitutional protections and "approved" the compacts with a minority of elected and serving representatives. The constitution requires a more responsible form of legislative decision-making. Therefore, this method of"approving" the compacts must be ruled unconstitutional.

IV. Other State Supreme Courts that have examined compacts agree that compacts are legislative in nature.

Although less than half of the States have entered into gambling compacts with Indian tribes, States normally enter into such compacts pursuant to legislation, either by approving the compacts by bill or by enacting enabling legislation prescribing the process for compact negotiation.[15]

---

[15] Some were enacted by legislative bill. *See e.g.* Cal Gov't Code 12012.5(a), (b) (California), NM Stat Ann 11-13-1 (New Mexico); cf. Ohio Rev Code Ann 107.25 (Ohio statute setting forth procedure for ratification of compacts by legislative act). Many were entered into pursuant to a specific statute delegating the authority to negotiate and execute tribal compacts to the governor or a particular commission or committee. *See Ariz* Rey Stat 5-601 (Arizona), Cal Gov't Code I2012.5(d) (California), Cole Rev Stat 12-47.2-101 and 12-47.1-301 (Colorado), Idaho Code 67-429A (Idaho), Iowa Code 10A.104(10) (Iowa), Kan Stat Ann 46-2303 (Kansas),

Other State Supreme Courts that have considered this issue also agree that gambling compacts are legislative in nature, thereby necessitating formal legislative action. For example, in *Kansas v Finney,* 251 Kan 559, 582; 836 P2d 1169 (1992) (per curiam), the Kansas Supreme Court ruled that a compact giving the State the right to inspect tribal casinos and creating a new "State Gaming Agency" within the Kansas Lottery was legislative in nature. Similarly, in *New Mexico v Johnson,* 120 NM 562, 573; 904 P 2d 11 (1995), the New Mexico Supreme Court invalidated IGRA compacts entered into by the governor because the compacts changed existing public policy:

> Our legislature has, with narrow exceptions, made for-profit gambling a felony, and thereby expressed a general repugnance to this activity. Whether or not the legislature, if given an opportunity to address the issue of the various compacts, would favor a more

---

La Rev Star--Ann 46:2303 (Louisiana), Minn Stat 3.9221 (Minnesota), Neb Rev Stat-9-1,106 (Nebraska), ND Cent Code 54-58-03 (North Dakota), Okla Stat Ann, tit 74, 1221 (Oklahoma), SD Codified Laws 1-4-25 and 42-713-11 (South Dakota), Wash Rev Code 9.46.360 and 43.06.010 (Washington), Wis Stat 14.035 (Wisconsin). Other states have more generally, through their constitution or statute, delegated the authority to transact business or form agreements and compacts with the Indian tribes. *See Willis v Fordice,* 850 F Supp 523, 532-533, n 10 (SD Miss, 1994) (holding that Mississippi statute, Miss Code Ann 7-1-13, authorized the governor to negotiate and transact business, including compacts, with other sovereigns, such as Indian tribes), Merit Code Ann 18-11-103 and 90-1-105 (Montana).

> restrictive approach consistent with its actions in the past constitutes a legislative policy decision.

Johnson, 120 NM at 574.[16] The court also looked at the State's past practices and noted that since 1923 the State had entered into twenty-two compacts with other sovereign entities, and "[i]n every ease, New Mexico entered into the compact with the enactment of a statute by the legislature." *Id.* at 575. Finally, in *Saratoga County Chamber of Commerce lnc v Pataki,* 2003 NY Lexis 1470, *34; __ NE2d __ (NY, 2003), *cert den* 2003 US Lexis 8378; ___ US __ (November 17, 2003) the New York Court of Appeals invalidated a 1993 compact, explaining that gaming compacts

---

[16] The New Mexico Supreme Court confirmed this result in *Gallegos v Pueblo of Tesuque,* 132 NM 207; 46 P3d 668 (2002), when it ruled that as a result of its prior decision the compacts were invalidated until enacted as legislation in 1997. According to the *Gallegos* court the compact was "a contract between the State of New Mexico and Tesuque, codified by the Legislature," *Gallegos,* 132 NM 218, which is consistent with the general rule that compacts are both contracts and statutes. *See also* NW Stat Ann 11-13-1 (enacting IGRA compacts). Although the *Gallegos* court cites without discussion *Confederated Tribes of the Chehalis Reservation v Johnson,* 135 Wash 2d 734, 750; 958 P2d 260 (1998) ("compacts are agreements, not legislation"), it is apparent from a review of the *Johnson* case that the Washington court was speaking in terms of compact *interpretation-i.e.,* that, for purposes of interpretation, compacts follow the rules of contract interpretation. Washington had previously enacted enabling legislation that empowered a commission to enter into compacts. *See* RCW 9.46.360(9).

are "laden with policy choices" that epitomize legislative power.

Like the compacts in *Finney, Johnson and Pataki,* the compacts at issue in this case also require legislative action. The compacts "approved" by HCR 115 are laden with policy choices, as recognized by Michigan's Attorney General. OAG, 1997, No 6,960, pp *4-*5 (October 21, 1997) (App at 44a). The compacts create a new layer of government, requiring the local communities impacted by the casinos to create "Revenue Sharing Boards." Compacts at § 18 (App at 66a-68a). Approval of these compacts by concurrent resolution also departs from the established practice of entering into compacts by statute. Michigan Legislative Service Bureau, *Interstate Compacts,* pp 5-6 (App at 5a-6a). Consistent with *Blank* and the decisions of other States, the compacts at issue could not be approved by mere concurrent resolution.

V. The Court of Appeals' interpretation of IGRA is clearly erroneous and must be reversed.

The Court of Appeals erred in it's interpretation of IGRA. The Court held: (1) that IGRA preempts all State regulation of casino gambling on Indian lands, a ruling that robs the State of the authority Congress expressly granted to it under IGRA; (2)that the federal government can force compacts on States, a determination inconsistent with that of the United States Supreme Court; (3) that IGRA and the federal Compacts Clause determine the manner in which a State must approve an IGRA compact, therefore displacing State constitutional law; and (4) that the compacts are mere contracts, thus ignoring their legislative impact. None of these holdings withstand scrutiny.

A. IGRA does not preempt state law, but instead provides a mechanism for the states to regulate gambling on Indian lands.

A remarkable component of the Court of Appeals' decision is its conclusion that IGRA preempts a State's role in regulating casino gambling on Indian lands. Specifically, the court noted: "The compact agreements were not the result of a decision by the citizenry at large or a policy choice by members of the legislature, but rather, the result of congressional policy in an area where state law is preempted." Ct of Appeals Op at 11 (App at 132a). This is contrary to the plain language of IGRA. If allowed to stand, this ruling would leave the State with no voice as to the nature of Indian gambling within its borders, precisely the opposite of what Congress intended by enacting IGRA. *See* Argument Section I, *supra,* at pp 8-10.

As noted above (see pages 9-10), in the absence of a duly enacted gambling compact, Congress expressly made State gambling laws apply to Indian country. 18 USC 1166.[17] This express determination by Congress reversed the impact of *Cabazon* and ensured that state policy determinations regarding gambling would apply to Indian lands. Citing this

---

[17] Under § 1166, federal authorities enforce state gambling laws on Indian lands. Thus, courts that have looked at § 1166 have concluded that conduct violating state licensing, regulatory or prohibitory law is punishable under that section, even though the activity may not violate federal law. *See United States v Cook,* 922 F2d 1026, 1034 (CA 2, 1991) (affirming conviction for operation of slot machines in violation of New York law).

provision, the California Supreme Court recently confirmed that federal law does not "preempt" state laws concerning gambling in Indian country, but instead applies them. *See Hotel Employees & Restaurant Employees Int'l Union* v Davis, 21 Cal 4th 585, 611; 981 P2d 990 (1999).[18]

Second, if a State enters into a compact with a tribe, IGRA's compacting provision gives a State the right to ensure that it's policies will continue to apply. 25 USC 2710(d)(3)(c)). As with all compacts between sovereigns, this ability is not unilateral nor without limitation.[19] IGRA requires that states negotiate "in good faith" to enter into a compact.[20] 25 USC 2710(d)(3)(A). This obligation, however,

---

[18] While the Eighth Circuit, in *Gaming Corp of America v Dorsey & Whitney,* 88 F3d 536 (CA 8, 1996), stated that IGRA completely preempts state gambling laws on Indian lands, *the Dorsey* court was dealing with a jurisdictional removal question and thus only looked at the preemption issue in the context of federal court jurisdiction; it did not consider the impact of 18 USC 1166. Two years later, the Eighth Circuit, under 18 USC 1166, applied state law to prohibit Indian casino gambling conducted without a compact. *See United States v Santee Sioux Tribe of Nebraska,* 135 F3d 558, 563-65 (CA 8, 1998). TOMAC is unaware of any case holding that state laws relating to casino gambling do not apply to Indian lands in the absence of a compact.

[19] All State legislation is, of course, subject to limitation by the U.S. Constitution, Michigan's constitution, federal laws, and the bounds of State jurisdiction.

[20] What constitutes good or bad faith has received little attention in the courts due to the decision in *Seminole Tribe of Florida v Florida,* 517 US 44; 116 S Ct 1114; 134 L Ed 2d

does not strip the State of the fight or the duty to make policy decisions in the course of negotiations. Thus, the IGRA compacting process gives a state a means to pursue, negotiate and apply its policy choices to tribal gaming.

The Court of Appeals was wrong not only when it declared that the State's role was preempted by IGRA, but also when it ruled that "federal law dictates that the state negotiate compacts with Indian tribes to allow casino gambling on Indian reservations." It is true that the original legislative scheme permitted a tribe to sue a state in federal court for refusing to negotiate in good faith over a compact, and permitted the federal court to order a state to conclude a compact or to submit to mediation. *See* 25 USC 2710(d)(7). The United States Supreme Court, however, has invalidated this unconstitutional imposition on state sovereign immunity and ruled that an Indian tribe cannot use IGRA to sue an unconsenting state in federal court. *Seminole Tribe of Florida v Florida,* 517 US 44, 72-73; 116 S Ct 1114; 134 L Ed 2d 252 (1996). The decision in *Seminole* preserves the power of the states to control the spread of Indian casino gambling

---

252 (1996), which held that states are immune under the Eleventh Amendment from suits that attempt to force states to negotiate IGRA compacts. However, the Eighth Circuit, pre-*Seminole,* was confronted with this issue and determined that a State could demand "in good faith" compact provisions that were consistent with state law. *Cheyenne River Sioux Tribe v South Dakota,* 3 F3d 273, 279 (CA 8, 1993) (ruling that State was not negotiating in bad faith by refusing to agree to set betting limits higher than State statutory $5 limit).

within their borders.[21] Contrary to the Court of Appeals' decision, a state need not negotiate any compact at all.

---

[21] The Bureau of Indian Affairs ("BIA") responded to *Seminole* by promulgating regulations that purportedly authorize the agency to impose a compact on an unwilling state by "administrative" proceedings initiated by a tribe. *See* Bureau of Indian Affairs: Class RI Gaming Procedures, 64 FR 17535 (April 12, 1999) (codified at 25 CFR 291). But these regulations are also invalid. In the first place, Congress explicitly delegated all power to enact regulations under IGRA to the newly created National Indian Gaming Commission, not BIA. *See* 25 USC 2706(b)(10), 2709. Second, no executive agency has the power to claim for itself a function-in this case, enforcement of IGRA's compacting procedures-that the statute expressly grants to the federal courts. *See Adams Fruit Co v Barrett,* 494 US 638, 649-50; 110 S Ct 1384; 108 LEd 2d 585 (1990) (refusing to honor agency regulations regarding workers' compensation benefits where Congress delegated enforcement to the judiciary). Finally, any attempt by BIA to do in an administrative forum what *Seminole* said could not be done in court violates sovereign immunity to the same extent as IGRA itself did. *See South Carolina State Ports Authority v Federal Maritime Comm'n*, 535 US 743, 760; 722 S Ct 1864; 152 L Ed 2d 962 (2002) (striking down agency enforcement scheme on the basis of sovereign immunity: "[I]f the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a state to do exactly the same thing before ... an agency .... "). To TOMAC's knowledge, the BIA rules have not been used to force any state to negotiate or accept a compact against its will.

In short, these erroneous rulings by the Court of Appeals diminish the role of the state to merely rubber-stamping an Indian tribe's gambling preferences. This is inconsistent with the plain language of IGRA and robs the State of powers that the United States Supreme Court has recognized are preserved to the State under the United States Constitution. These rulings must be reversed.

B. The Court of Appeals erred in deciding that federal law rather than state law determines the manner in which IGRA compacts are approved.

The Court of Appeals also incorrectly held that federal law determines the manner in Which a state approves compacts. Specifically, the court erred in ruling that (1)IGRA expressly authorizes the State legislature to approve a compact by concurrent resolution, and (2) the federal Compact Clause authorizes approval by concurrent resolution. To the contrary, state law determines the proper process for approval of a compact and requires that the compacts be approved as legislation.

1. State constitutional law determines how states enter into compacts.

State law not only sets gambling policy, it also determines how a state can validly "enter into" and bind itself to a gambling compact under IGRA. The question of whether state or federal law determines the manner in which a compact is approved was squarely addressed in *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1557-1558 (CA 10, 1997). *Pueblo of Santa Ana* involved a declaratory action brought by Indian tribes from the State of New Mexico for a determination that certain compacts approved by the Secretary of the Interior pursuant to IGRA were valid even though the governor of the

State of New Mexico lacked authority to enter into the compacts, *Id.* at 1548. The Tenth Circuit determined that a compact, even if approved by the Secretary of the Interior, is invalid unless it is first properly approved by a state. *Id.* at 1555. The court then applied U.S. Supreme Court precedent to conclude that in the absence of specific guidance in IGRA, *state law* would determine the proper procedure for executing valid compacts. *Id.* at 1557-1558.

The California Supreme Court recently agreed: "[for a compact] [t]o be 'entered into' [under IGRA] by the state and the tribe means to be 'entered into' validly in accordance with state (and tribal) law." *Hotel Employees,* 21 Cal 4th at 612; *accord, Saratoga County Chamber of Commerce, Inc v Pataki,* 712 NYS2d 687, 696; 275 AD2d 145 (NY App Div, 2000) (ruling that state law determines whether a state has validly bound itself to a compact); see *also New Mexico v Johnson,* 120 NM at 578 (ruling that the United States Congress cannot expand the authority of a state or its officials over and above the authority granted by a state's constitution).

2. IGRA does not determine how a compact is approved.

The Court of Appeals erroneously interpreted IGRA as expressly authorizing a state's approval of a compact by resolution. Ct of Appeals Op at 12-13 (App at 133a-134a). This is a simple misreading of the statute. *See* 25 USC 2710(d). While IGRA specifies that the *Indian tribe* may approve a compact by resolution, *see* 25 USC 2710(d)(1)(A), it is silent as to how a state must approve of the compact, *see* 25 USC 2710(d)(1)((2). Even Appellee, the State of Michigan, admits: "IGRA does not specify what is required for a state to validly bind itself to a compact. It has been held that the issue is determined by state law. *See Pueblo of Santa*

Ana v Kelly, 104 F3d 1546, 1557 (CA 10 1997)." (State of Michigan's Brief in Opposition to Application for Leave to Appeal at 5 n 3.) *See also Saratoga County,* 2003 NY LEXIS 1470, *33 (ruling that IGRA leaves to state law who will negotiate and agree to a compact).

3. The federal Compact Clause is also inapplicable.

In ruling that concurrent resolution was an appropriate method of approving these compacts, the Court of Appeals also relied heavily upon cases interpreting the federal Compact Clause to conclude that approval by bill was unnecessary. Citing *United States Steel Corp v Multistate Tax Comm'n,* 434 US 452; 98 S Ct 799; 54 LEd 2d 682 (1978), the court noted, "The approval by resolution contained in the IGRA is consistent with federal law addressing compacts. Congressional approval was generally one of historic occurrence rather than necessity. The true test of congressional approval occurs when powers of an entity are usurped." Ct of Appeals Op at 13 (App at 134a). While the federal Compact Clause may address the question of whether and how the U.S. Congress must approve a compact, it does *not* address the way in which a *state* must *enter into* a compact.[22]

---

[22] The federal Compact Clause provides: "'No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power ...." US Const, art I, § 10, cl 3. A literal reading of the clause would require the states to obtain congressional approval of some form before entering into any agreement among themselves. The U.S. Supreme Court, however, has eschewed such an approach and held that congressional

The *Multistate Tax Commission* opinion verifies that the federal Compact Clause is inapplicable here. The ease involved the issue of whether a compact between states, establishing a Multistate Tax Commission, requires approval by the United States Congress. *Multistate Tax Comm'n,* 434 US at 454. The Supreme Court concluded that Congressional approval was not required because the compact did not impermissibly encroach upon federal supremacy. *Id.* at 472-473. What was not in dispute, and what the Court *did not address,* was the mechanism by which the states had entered into the compact. In fact, each state that had entered into the compact, including Michigan, had done so by way of legislation, *Id.* at 454 n 1; *see also* MCL 205.581.

No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs. *See, e.g., Pueblo of Santa Arm,* 104 F3d at 1557-1558. Under Michigan law, the appropriate test for determining whether the compacts constitute legislation, requiring approval as a bill, is set forth in *Blank. The* Court of Appeals' reliance upon *Multistate Tax Commission, instead of Blank,* is clear error.

C. The Court of Appeals erred in concluding that the legislature routinely approves compacts by resolution.

---

approval of a compact is only required for agreements that tend to encroach upon or interfere with the supremacy of the United States. *See Multistate Tax Comm'n*, 434 US at 471, *Cuyler v Adams,* 449 US 433, 440; 101 S Ct 703; 66 L Ed2d 641 (1981).

As its final argument for finding that the compacts could be approved by concurrent resolution, the Court of Appeals stated that "contracts executed by the State of Michigan are routinely approved by the resolution process." Ct of Appeals Op at 13 (App at 134a). This ignores the crucial distinction between a ,mere contract for goods or services and a compact between the State and an Indian tribe *regulating* gambling on Indian lands. As made clear by *Chadha and Blank,* it is the effect of the action, not its form, that is determinative. While a compact may take the form of a contract, its substantive impact is legislative. Michigan Legislative Service Bureau, *Interstate Compacts,* p 3 (App at 3a). Michigan's long-standing practice has been to approve *compacts* as legislation. *See id.* at 11-36 (App at 11 a-36a); *see also* Argument Section II, *supra* at 10-12 and n 3.

In further support of its position, the Court of Appeals pointed to a set of IGRA compacts that were at issue in the cases *Tiger Stadium Fan Club, Inc v Governor,* 217 Mich App 439; 553 NW2d 7 (1996), *app den* 453 Mich 866, and *McCartney v Attorney General,* 231 Mich App 722; 587 NW2d 824 (1998), *app den* 601 Mich 101. While both *Tiger Stadium and McCartney* dealt with issues related to Indian gambling, neither case dealt with the determinative issue here: whether IGRA compacts require legislative enactment under the Michigan constitution.

Tiger Stadium involved a question regarding the status of funds paid by Indian tribes into the Michigan Strategic Fund under a federal court consent decree settling a compacting dispute under IGRA. *Tiger Stadium,* 217 Mich App at 441-442. The court concluded that the funds at issue were not subject to the Appropriations clause, so that the governor did not need to seek legislative action before agreeing to the payment directly to the fund. *Id.* at 454-455. The court,

however, did not decide the threshold question of whether the compacts were legislation. In fact, the court acknowledged that it was not deciding this question. *Id.* at 455-456 n 5 ("We recognize that it is a separate question whether the concurrent resolution would constitute sufficient legislative action if the revenues were determined to be subject to appropriation, one we do not address because our decision that the revenues are not subject to appropriation makes it unnecessary to do so.")

McCartney involved a suit under FOIA to obtain certain State documents related to IGRA compact negotiations. *McCartney,* 231 Mich App at 724. The court focused on the Governor's power to negotiate compacts, not on whether compacts require legislative approval by bill. *See id.* at 729. If anything, the court strongly implied that the IGRA compacts were legislation by noting, in reference to the compacts, that the Governor "is constitutionally authorized to present and recommend *legislation*" to the legislature. *McCartney,* 231 Mich App at 726 (emphasis added). Other courts, in fact, have cited *McCartney* for the proposition that IGRA compacts are legislative in nature. *See, e.g., Saratoga County,* 2003 NY Lexis 1470, at *37 (citing *McCartney).* In any case, neither *Tiger Stadium* nor *McCartney* decided whether compacts required approval by bill.

As additional support for its characterization of the compacts as mere "contracts," the Court of Appeals also noted, "irrespective of whether the terms of the compact encroach upon legislative functions, the inability to enforce those terms precludes a challenge to the constitutionality of the compact." Ct of Appeals Op at 13 (App at 134a). The court's apparent conclusion-that the compacts are unenforceable is contrary to the plain language of the compacts. The compacts specifically allow the State to inspect the tribal casino operations, *see* Compacts at § 4(M)(2) (App

at 57a), and include an enforcement provision in the event that the State believes that the tribe is not administering and enforcing the regulatory requirements set forth in the compact, *id.* at §§ 4(M)(6), 7 (App at 10a, 11a-12a). IGRA specifically gives substance to these provisions as it only allows gambling to take place "in *conformance* with a Tribal-state compact." 25 USC 2710(d)(1)(C) (emphasis added). Moreover, the Court of Appeal's focus on the enforcement language as a test for whether the compacts are legislative in nature is misguided, for the choice of whether and how a compact will be enforced is itself a policy decision that is legislative in nature. The court should have applied the *Blank* analysis, and its failure to do so is clear error.

VI. The compacts violate Article III, Section 2 (separation of powers) of Michigan's constitution because they purport to empower the Governor to make policy judgments without legislative approval.

Michigan's constitution provides for a separation of powers between the branches of government:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 3, § 2. The legislative power is clearly reserved in Michigan's constitution to the State House and Senate. Const 1963, art 4, § 1. Thus, it is neither the

Governor's duty nor right to enact legislation.[23] Instead, it is the task of the executive branch to "take care that the laws be faithfully executed." Const 1963, art 5, § 8; *Sutherland v Governor,* 29 Mich 320, 324 (1874) (Cooley, J.), see *also Musselman v Governor,* 200 Mich App 656, 664; 505 NW2d 288 (1993) (quoting *Sutherland), aff'd* 448 Mich 503. Any delegation of power between the branches of government must be "limited and specific." *Judicial Attorneys Ass'n v Michigan,* 459 Mich 291, 296-297; 586 NW2d 894 (1998).

The compacts unconstitutionally grant the executive branch legislative authority in violation of the Michigan constitution. They empower the Governor to amend the compacts without any legislative approval. *See* Compacts at §§ 16(A)(i)-(iii), (B), (C) (App at 64a-65a); Cir County Ct Op at 13 (App at 134a). Indeed, they require the Governor to report an amendment to the legislature only *after* the amendment has already been approved and entered into by the Governor and by the Secretary of the interior. Compacts at §§ 16(B)-(D) (App at 65a). And the scope of the Governor's authority to enact amendments is virtually unlimited. The only restriction is on the Governor's ability to amend the definition of "eligible Indian lands" to permit gambling in counties other than those listed in the compacts, *Id.* at § 16(A)(iii) (App at 64a). Otherwise, the Governor has complete freedom to amend the compacts without legislative approval.

---

[23] The Governor may present and recommend legislation. Const 1963, art 5, § 17. But she may not bind the State to legislation without seeking the approval of the legislature by bill. *See e.g., McCartney v Attorney General,* 231 Mich App 722; 587 NW2d 824 (1998).

The Michigan Court of Appeals ruled that this issue was not yet ripe because the compacts have not yet been amended. But on July 22, 2003, Governor Granholm signed on behalf of the State of Michigan an amendment to one of the Indian compacts challenged in this ease. Amended Compact (App at 136a-139a). The Amendment, which is "binding on the State" for a new term of twenty-five years, demonstrates the far-reaching policy-making power now in the hands of the Governor. Significantly, the amendment:

- *Gives the Little Traverse Bay Bands of Odawa Indians (the "Odawa") an extra casino.* See Amended Compact at § 2(B)(I, (App at 136a). The Traverse City Record Eagle reports that the Odawa are looking at a site in Mackinaw City for their second casino. Keith Matheny, *Granholm Gives OK to New Casino,* Traverse City Record Eagle, July 26, 2003. While casino advocates were unable to garner a legislative majority to support even one casino for the Odawa, now there will be two. Whether the People of the State of Michigan are in favor of yet another casino in northern Michigan is not known because they were never informed through the legislative process.

- *Gives the Governor control over casino revenue sharing payments made to the State.* Previously, the compact required that all revenue sharing payments flow to the Michigan Strategic Fund. Now, all such payments are to go "to the State, as *directed by the Governor or designee."* Amended Compact at § 17(C) (App at 138a). Thus, the Governor can apparently send millions of dollars to the general fund or whatever pet agency, department, or quasi-governmental unit she chooses. This is nothing more

than an appropriation of State funds without a legislative enactment.

- *Changes the age of legal gambling at the new casino from 18 to 21.* Amended Compact at § 4(1) (App at 137a). The implications of this change, however salutary on policy grounds, are troublesome: the Governor alone can now set the legal gambling age at Indian casinos, or do away with the restriction altogether. This is a legitimate issue of State policy that should receive approval by legislative enactment.

- *Trades revenue sharing payments to the State for a casino monopoly in a ten county area and d moratorium on new lottery legislation.* Amended Compact at § 17 (App at 137a-139a). If a "change in State law is enacted" allowing gambling in a ten county area, "including expansion of lottery games beyond that allowable under State law on the date of execution of this document," then payments to the State cease. In effect, a government-sanctioned ten county monopoly has been created, and payments have been arranged to help protect the future of the monopoly, without any legislation whatsoever.

As the amendment illustrates, the compacts allow the governor to make policy choices that have a tremendous impact on the State of Michigan, including more casinos, more deals to raise revenue, and any number of other decisions that will be made without legislative approval. These important choices will never be approved by a majority of the Michigan legislature unless the Court of Appeals' ruling is reversed.

VII. The compacts are local acts under Article IV, Section 29 (local or special acts) of Michigan's constitution because they expressly operate with particular impact on four specifically identified communities within the State.

A. The compacts are local acts.

The compacts are not only legislation, they are "local act" legislation because they operate with particular impact on four Michigan communities rather than on the State as a whole. In general, a local act is an act "which operates over a particular locality instead of over the whole territory of the state or any properly constituted class or locality therein, or which operates on particular persons or things in a class, or which relates to the property or persons of a particular locality." OAG, 1979-1980, No 5,711, p 794 (May22,1980) (quoting 82 CJS, Statutes, § 168, pp 283-284). The legislature cannot circumvent the constitutional prohibition against local acts by subterfuge-instead, it is the practical operation of the legislation that determines its character. *See Michigan v Wayne Co Clerk,* 466 Mich 640; 648 NW2d 202 (2002) (ruling that failure of statute to identify Detroit by name did not prevent it from being a local act); *City of Dearborn v Board of Supervisors,* 275 Mich 151, 157; 266 HW 304 (1936) (invalidating statute that could only apply to Wayne County).

In this case, the legislature did not even attempt to disguise the local nature of the act. Rather, it expressly limited the effect to four specified Michigan communities: 1) the Pokagon Band is limited to the counties of Allegan, Berrien, Van Buren, and Cass; 2) the Little Traverse Bay Bands of Odawa Indians to the counties of Emmet and Charlevoix; 3) the Little River Band of Ottawa Indians to the

counties of Manistee and Mason; and 4) the Huron Potawatomi Indians must build its casino in Calhoun County. To ensure that the effects will be limited to these communities, the compacts make it practically impossible for any of the tribes to establish additional casinos outside of these areas by requiring that any such casino must share revenues with all other recognized tribes in the State. Compacts at § 9 (App at 61a). Locality is further restricted by a complete prohibition of any casino within 150 miles of Detroit (or 90 miles in the case of the Calhoun County casino). *Id.* at § 16(A)(iii) (App at 64a).

Because the casinos are limited to four specific communities, the compacts are local acts. In *Huron-Clinton Metro Authority v Board of Supervisors,* 300 Mich 1; 1 NW2d 430 (1942), the Michigan Supreme Court verified that Michigan Act No. 147 of 1939, establishing the Huron-Clinton Metropolitan Authority, was a local act. Like the present case, the Act restricted the Authority's powers and duties (generally, to purchase, own and operate parks) to five named counties. Unlike the present case, however, the Act was passed according to the constitutionally prescribed procedures for local acts. *Id.* at 14.

B. The compacts do not comply with the constitutional requirements for local acts.

The Michigan constitution imposes strict limits on the ability of the legislature to use local acts:

> The Legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. *No local or special act shall take effect until approved by two-thirds of the members*

> *elected to and serving in each house and by a majority of the electors voting thereon in the district affected.*

Const 1963, art 4, § 29 (emphasis added). This Section is intended to eliminate the vast volume of local legislation that once burdened and discredited the legislature. *Common Council of the City of Detroit v Engel,* 202 Mich 536, 543; 168 NW 462 (1918). As such, the Section's restrictions are viewed expansively, *Id.*

The prohibition against local acts guards against unjustified favoritism, or its opposite--the saddling of certain communities with undesirable "not in my back yard" projects. Such considerations are especially appropriate in the instant case. It is easy to imagine winning support for the compacts by pointing out that the casinos could only be built in certain communities in the State and, therefore, most legislators would be insulated from negative Consequences in their districts or from their constituents. Meanwhile, the citizens in those areas are burdened with additional traffic, crime, and public services that they must provide as a consequence of the compacts.

Despite this, the Court of Appeals ruled that the compacts were not local acts, allegedly because "[t]his state has no authority to regulate conduct on Indian tribal lands." Ct of Appeals Op at 14 (App at 135a). As demonstrated above, however, the court has wrongly concluded that IGRA robs the State of authority over Indian gambling. Even more fundamentally, the geographic restriction is not about regulating conduct on Indian lands, but rather about limiting gambling to certain parts of the State.

Under IGRA, the Indian tribes are not limited to their current reservation land for casino operations. Rather, the

tribes can request the federal government to take additional lands in trust as Indian lands suitable for gambling under IGRA. *See* 25 USC 465; 25 USC 2719. In many cases, particularly where the land is part of a restoration of lands (e.g., the Pokagon Band) or an initial reservation (e.g. the Huron Potawatomi), IGRA does not impose any geographic restriction as to where these additional lands may be. Thus, without the geographic restrictions found in the compacts, the tribes could potentially open a casino anywhere within the State. These geographic restrictions, therefore, operate to keep casino operations out of all but the four communities identified in the compacts. *See* Compacts at §§ 9, 16(A)(iii) (App at 61a, 64a). This is a policy decision, insulating the Detroit casinos from competition and other Michigan communities from the unwanted burdens associated with gambling operations. Because the compacts limit the tribes to certain areas of the State when they would not otherwise be so-limited, the compacts are local acts.

The Ingham County Circuit Court also erroneously ruled that the compacts were not local acts. The court based the holding on its conclusion that TOMAC had failed to argue that a general act could have accomplished the same purpose as the local act. With all due respect to the Circuit Court, it appears to have misread the requirements of the constitution.

Constitutional provisions must be interpreted in "the sense most obvious to the common understanding ...." *House Speaker v Governor,* 443 Mich 560, 577; 506 NW2d 190 (1993). The most obvious and plain reading of Section 29 is to impose three requirements on local acts: 1) there can be no local act at all if it is possible to enact an act of general application; 2) any proper local act must be approved by a two-thirds vote of the legislators; and 3)any proper local act must be approved by a vote of the people in the affected

community. Failure to comply with *any* of the above requirements is enough to invalidate a local act. Since HCR 115 was "passed" without a two-thirds vote of the legislature and without approval by vote of the people in the affected communities, it failed to comply with the local acts requirement regardless of whether an act of general application was possible.

Moreover, even if it were necessary for TOMAC to establish that a general **act** was possible, TOMAC can do so. A general act would have included approving the compacts minus the restriction on where the casinos could be located, leaving the "Indian lands" question up to the normal operation of IGRA. Thus, if a tribe could procure Indian trust lands in Detroit, it could build a casino there. A general act could easily have been enacted if the political will had existed.[24]

Other States have used the general act approach. Several States have enacted general enabling acts that give the statutory authority to a person or committee to enter into compacts under IGRA without territorial restrictions. *See e.g.,* La Rev Stat Ann 46:2303, Wis Stat 14.035; Wash Rev Code 9.46.360. These are general acts that are not slanted or biased for, or against, any particular location. The Michigan legislature's failure to muster a political majority for this approach is not a constitutional justification for pawning the problem off on four communities.

---

[24] Indeed, the legislature originally tried a general act approach by proposing to create by an enabling act a public body that would pass on questions of proposed compacts regardless of their location. *See* SB 1061 (1988) (App at 39a-42a). The proposal failed.

The compacts are local acts, yet were not approved by a two-thirds vote of the State House and Senate and by a majority vote of the affected electorate, as required by Michigan's constitution. The compacts are also invalid because they are local acts that were "enacted" when an act of general applicability could have been enacted instead. For both of these reasons, the compacts violate Article IV, Section 29 of Michigan's constitution of 1963.

CONCLUSION

The "quintessential political judgment" on what terms, if any, to permit casino gambling within the State of Michigan requires public policy judgments. The Michigan constitution requires the legislature, not the Governor, to make these judgments, and to do so by legislative enactment. A resolution supported by neither a majority of all elected and serving legislators, nor by any of the constitutionally required formalities for legislation, is an unlawful end run around the constitution, as both the Circuit Court and the Michigan Attorney General recognized.

Contrary to the Court of Appeals' ruling, IGRA does not trump the State's policy-making role. Quite the opposite: IGRA actually reinforces the role of the State by expressly applying to Indian country the normal laws of the State governing casino-style gambling, unless and until the State makes different policy choices in a valid gambling compact. IGRA itself makes no policy choices for the State. IGRA does not set age limits for gambling. IGRA does not prescribe who may and may not work in a casino. IGRA does not specify the games of chance that a casino may offer. IGRA does not establish wagering limits for the allowed games. IGRA does not direct how much money, if any, the casino must pay to the host state. All of these public policy choices–and hundreds more---are left to a state's judgment in the compacting process.

When the State of Michigan makes binding choices like these for people outside the legislature, the Michigan Constitution requires it to do so by legislative enactment, as this Court held in *Blank,* a ease the Court of Appeals completely ignored. Like the Court of Appeals, the legislature failed to honor *Blank* and the constitutional

requirements it articulated. Instead, after failing to marshal a majority of legislators in support of a legislative enactment, a minority of legislators tried to make these public policy choices by resolution. This Court must declare the attempt invalid and direct that Indian gambling compacts be approved, if at all, by legislative enactment consistent with all applicable provision of the Michigan Constitution.

Dated: November 20, 2003

WARNER NORCROSS & JUDD LLP

By /s/_____

Robert J. Jonker (938552)
William C. Fulkerson (913758)
Norbert F. Kugele (947084)
Daniel K. DeWitt (951756)

Business Address:
111 Lyon Street, NW, Suite 900
Grand Rapids, M149503-2489
Telephone: (616) 752-2000

Attorneys for TOMAC

Dated: November 20, 2003

(4)

No. 04-581

Supreme Court, U.S.
FILED
JAN 14 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,

Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

REPLY BRIEF OF PETITIONER

ROBERT J. JONKER*
DANIEL P. ETTINGER
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000
Counsel for Petitioner

January 14, 2005

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONERS 1

CONCLUSION 8

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003) 2

Cuyler v. Adams, 449 U.S. 433 (1981) 6

Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536 (8th Cir. 1996) 3

Keweenaw Bay Indian Community v. United States, 136 F.3d 469 (6th Cir. 1998) 2

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997) 6

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) 6

Williams v. Lee, 358 U.S. 217 (1959) 7

STATE CASES

Panzer v. Doyle, 680 N.W.2d 666 (Wis. 2004) 3

Saratoga County Chamber of Commerce v. Pataki, 798 N.E.2d 1047 (N.Y. 2003) 3

State ex rel. Stephan v. Finney, 836 P.2d 1169 (Kan. 1992) 3

STATUTES

28 U.S.C. § 1166 ..... *passim*

28 U.S.C. § 1257 4

REPLY BRIEF OF PETITIONERS

TOMAC's petition for certiorari sets forth a clear, substantial, and mature conflict on an important question of federal statutory interpretation: whether Congress empowered the States under the Indian Gaming Regulatory Act to establish the regulatory rules applicable to Indian casino gambling within a State's borders. Respondents claim that the Michigan Supreme Court's ruling on this issue was mere dictum, and thus irrelevant to the Michigan Supreme Court's analysis of whether HCR 115 constituted legislation. (State Opp. 11 ("the Michigan Supreme Court's resolution of the state constitutional claim did not depend on its view of the federal issue cited by Petitioner"); Gaming Entertainment Opp. 2 n.1 ("The question presented by Petitioner . . . was discussed by the Michigan Supreme Court only in *dicta*.")) But Respondents' claim is wrong: the Michigan court's mistaken construction of federal law was the necessary predicate for its state law ruling.

In determining whether HCR 115 constituted legislation, the Michigan Supreme Court stated, unequivocally, that "IGRA only grants the states bargaining power, not regulatory power, over tribal gaming." (Pet. App. 15.) This statement ignores Section 1166's plain and unambiguous text, which states that until such time as a compact is in effect, "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." (Pet. App. 13.) Based on its misinterpretation of this critical federal statute, the Michigan Supreme Court concluded that HCR 115 was not legislation because it modified only federal, not Michigan, law:

> Although Michigan's gaming law would have applied to gaming on tribal lands in the absence of a tribal-state compact, it applied only as a matter of *federal* law. Compacts establishing the terms of class III gaming on tribal lands modified only federal law. Therefore, our Constitution does not require that our Legislature express its approval of these compacts through bill rather than resolution.

(Pet. App. 3 (underlined emphasis added).)[1]

Respondents do not, and cannot, impugn the plain import of this holding, which is contrary to the view of the United States Courts of Appeals for the Ninth and Sixth Circuits, but aligned with published authority from the Eighth Circuit. *Compare Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 721-22 (9th Cir. 2003) ("IGRA . . . devised a method to give back some of the *regulatory* authority that the Supreme Court had held inapplicable to Indian lands in *Cabazon*. . . . [T]he fact that the federal government retained [enforcement] power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via § 1166.") *and Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 472 (6th Cir. 1998) ("Congress enacted the IGRA in 1988 and thereby created a framework for the regulation and management of gambling on Indian land . . . which included a role for

[1] It was only through the Michigan Supreme Court's tortured interpretation of IGRA that it was able to conclude that a Michigan legislative resolution – a procedure ordinarily reserved for non-substantive matters such as the recognition of a 100th birthday or the state flower – actually "approves a change in *federal* law." (Pet. App. 14.)

the states in the regulation of Indian gaming. . . .") *with Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 546 (8th Cir. 1996) ("Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the *only* method by which a state can apply its general civil laws to gaming is through a tribal-state compact.").

Had the Michigan Supreme Court properly interpreted IGRA as vesting some regulatory power in the State over Indian gaming, the Court would have been obligated to conclude that HCR 115 was legislation, thus requiring a majority of both houses of the Michigan Legislature for passage, as many other state supreme courts have held. *See, e.g., State ex rel. Stephan v. Finney*, 836 P.2d 1169, 1185 (Kan. 1992) ("[M]any of the provisions in the compact would operate as enactment of new laws and the amendment of existing laws."); *Saratoga County Chamber of Commerce v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003) ("Compacts addressing [regulatory issues] necessarily make fundamental policy choices that epitomize 'legislative power.'"); *Panzer v. Doyle*, 680 N.W.2d 666, 687 (Wis. 2004) (compacts "involve subtle and important decisions regarding state policy that are at the heart of legislative power"). (*See also* Pet. App. 86 n.48 (Markman, J., dissenting) ("every state supreme court that has directly considered this issue has held that tribal-state gaming contracts constitute legislation").)

Rather than address this conflicting authority head on, Respondents attempt to side step it by improperly reframing the question presented as one involving solely Michigan law (Gaming Entertainment Opp. i), or one

involving state regulatory power *after* a compact has been entered (State Opp. i).[2] Respondents then devote substantial space knocking down these strawmen, contending that their reframed questions are not the subject of a split in authority, and do not raise a federal question.

But both of Respondents' reframed "questions presented" are misguided caricatures of the actual basis for the Michigan Supreme Court's holding, which is quoted above. And once the Michigan Supreme Court's actual holding is considered, all of Respondents' objections to this Court's grant of certiorari fall away:

- The Michigan Supreme Court has misinterpreted a federal statute, thus leading the Court to improperly uphold an invalid State act. Such a decision falls within the scope of 28 U.S.C. § 1257(a) and vests jurisdiction in this Court (*contra* Gaming Entertainment Opp. 1-2.);

- The Michigan Supreme Court's misinterpretation of IGRA was the necessary predicate for its holding that HCR 115 was not legislation, thus creating the federal question that TOMAC asks this

[2] Alternatively, the State of Michigan argues that there is an adequate and independent state ground for the Michigan Supreme Court's decision, because even if this Court adopts TOMAC's position and applies Section 1166's plain language, the "Michigan Compacts would still be the products of mutual assent, not the result of unilateral state regulation." (State Opp. 14.) To begin, the State's argument ignores other, critical parts of the Michigan Supreme Court's holding. In addition, the State's position is wrong. If Section 1166 does vest some regulatory authority in the States over Indian gaming, as TOMAC asserts, then the Michigan Legislature's "unilateral" abdication of this power was itself legislation. Even though both the State and a Tribe were required to assent to a compact, only the State, acting unilaterally, had the ability to give up its federally delegated regulatory power over the Tribe.

Court to address (*contra* Gaming Entertainment Opp. 10-14);[3]

- The Michigan Supreme Court's decision cannot be reconciled with the decisions of sister States which, even if they did not cite 28 U.S.C. § 1166, relied on State regulatory power over Indian gaming to determine that compact execution requires legislation (*contra* Gaming Entertainment Opp. 14-20; State Opp. 17-20);

- The Michigan Supreme Court's holding that States have no regulatory power over Indian gaming cannot be reconciled with the contrary holdings of the Ninth and Sixth Circuits (*contra* Gaming Entertainment Opp. 20-22; State Opp. 15-16); and

- There is no adequate and independent state ground for the Michigan Supreme Court's decision, because the Court's decision depended directly on its misinterpretation of a federal statutory scheme (*contra* State Opp. 10-14).[4]

---

[3] Contrary to Gaming Entertainment's suggestion (Gaming Entertainment Opp. 11), TOMAC does not shrink from its assertion that the penultimate issue presented to the Michigan Supreme Court was one of state constitutional law, namely, whether Michigan's Constitution requires a legislative majority to execute a compact. To answer that question, however, the Michigan Supreme Court erroneously interpreted federal statutory law, an error that was ultimately fatal to the Court's state law analysis. The lower court record is replete with arguments regarding Section 1166's interpretation, and the issue is squarely addressed by the Michigan Supreme Court's opinion. It is more than disingenuous for Gaming Entertainment to imply that this question was not "pressed or passed upon below." (Gaming Entertainment Opp. 2 n.1.)

[4] *Compare* State Opp. 2 ("the court's understanding of IGRA did not decide the outcome of the state constitutional issue") *with* Pet. App.

(Continued on following page)

Respondents are similarly misguided when they argue that this case does not implicate the Compact Clause of the United States Constitution. (State Opp. 20-22; Gaming Entertainment Opp. 22-25.)[5] Although Congress enacted IGRA under its Indian Commerce Clause authority, as this Court held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996), Congressional authorization of State-Tribe compacts, by definition, transforms the compacts into federal law under the Compacting Clause. *See Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("Where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the State's agreement into federal law under the Compact Clause."). It should be no surprise, then, that at least one federal court of appeals has analogized State-Tribe gaming compacts to interstate compacts. *See Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). At a minimum, when Congress exercises its authority under the Indian Commerce Clause to delegate regulatory power over Indian affairs to the States, any dispute is, by nature, an appropriate matter

---

3 ("Compacts establishing the terms of class III gaming on tribal lands modified only federal law. Therefore, our Constitution does not require that our Legislature express its approval of these compacts through bill rather than resolution.") (emphasis added).

[6] Respondent State of Michigan mischaracterizes TOMAC's position below when it claims that TOMAC "flatly asserted that '[t]he federal Compact Clause is . . . inapplicable." (State Opp. 21 n.5.) TOMAC's argument there related solely to the Michigan Court of Appeals' holding that the Compact Clause was relevant in determining the way in which a state must enter into compacts. (State App. 121a (TOMAC's brief); Pet. App. 117-23 (Court of Appeals opinion).) It had nothing to do with whether a state court's interpretation of IGRA implicates a federal question.

for this Court's review. *See Williams v. Lee*, 358 U.S. 217, 218 (1959) (this Court will grant certiorari to address "important question[s] of state power over Indian affairs.").[6]

Finally, Respondents' own unique interpretation of Section 1166 (State Opp. 23-27; Gaming Entertainment Opp. 25-30) wreaks havoc on that statute's plain language and historical *raison d'etre*, as explained more fully in TOMAC's Petition. (Pet. 13-14, 19-25.) The confusion inherent in Respondents' understanding and the divided judicial opinions on this issue counsel strongly in favor of this Court's immediate intervention to resolve the growing split in federal and state court authority and to clarify the extent and nature of State regulatory power over Indian gaming.

---

[6] Gaming Entertainment also references the Michigan Supreme Court's remand regarding the Governor's compact amendment power, a narrow, state law issue. (Gaming Entertainment Opp. 9 n.8.) This is a red herring, intended to distract this Court from the actual federal question presented. The Court of Appeals has already stated that it will confine its ruling solely to the amendment power (*see id.*), and that proceeding therefore cannot and will not have an effect on the split in authority regarding the regulatory power Section 1166 grants to States over Indian gaming, the sole question presented here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. JONKER*
DANIEL P. ETTINGER
JOHN J. BURSCH
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, MI 49503
(616) 752-2000
Counsel for Petitioners

**Counsel of Record*

JANUARY 14, 2005